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Supreme Court of the United States

October Term, 1940.

No. 594.

UNION PACIFIC RAILROAD COMPANY, a Corporation; CITY OF KANSAS CITY, KANSAS; DON C. MCCOMBS, FRANCIS BLAKE and GEORGE T. DARBY, Commissioners, etc., ET AL., *Appellants*,

vs.

THE UNITED STATES OF AMERICA; THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; GUY A. THOMPSON, as Trustee of Missouri Pacific Railroad Company; MISSOURI PACIFIC RAILROAD COMPANY; FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH B. FLEMING, as Trustees of Chicago, Rock Island & Pacific Railway Company; CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY; KANSAS CITY, MISSOURI, ET AL., *Appellees*.

Appeal from the District Court of the United States for the Western District of Missouri.

APPELLANTS' BRIEF.

ALTON H. SKINNER,
BLAKE A. WILLIAMSON,
Counsel for Appellants City of Kansas City, Kansas; Don C. McCombs, Francis Blake and George T. Darby, as Commissioners and constituting the Governing Body of said City; Alton H. Skinner, Howard Payne and Truman Schlup, duly appointed officials of said City.

ARTHUR C. SPENCER,
THOMAS W. BOCKES,
ROBERT F. MAGUIRE,
HENRY N. ESS,
Counsel for Appellant Union Pacific Railroad Company.

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UNION PACIFIC RAILROAD COMPANY, a Corporation; CITY OF KANSAS CITY, KANSAS; DON C. MCCOMBS, FRANCIS BLAKE and GEORGE T. DARBY, Commissioners, etc., ET AL., *Appellants,*

vs.

THE UNITED STATES OF AMERICA; THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; GUY A. THOMPSON, as Trustee of Missouri Pacific Railroad Company; MISSOURI PACIFIC RAILROAD COMPANY; FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH B. FLEMING, as Trustees of Chicago, Rock Island & Pacific Railway Company; CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY; KANSAS CITY MISSOURI, ET AL., *Appellees.*

Appeal from the District Court of the United States for the Western District of Missouri.

APPELLANTS' BRIEF.

I.

THE OPINIONS BELOW.

The opinion of the District Court for the Western District of Missouri, rendered March 25, 1940, upon the issuance of the temporary injunction, appears in the Record (239-259) and is reported in 32 Fed. Supp. 917.

The opinion of the District Court for the Western District of Missouri, rendered July 8, 1940, on final de-

cree, appears in the Record (336-340) and is reported in 34 Fed. Supp. 4.

The supplemental opinion of the District Court for the Western District of Missouri, rendered July 13, 1940, on final decree, appears in the Record (376-7) but is not yet reported.

II.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

This cause is before this Court upon appeal taken by the City of Kansas City, Kansas, its officers, and Union Pacific Railroad Company, from the Final Decree rendered by the District Court of the United States for the Western District of Missouri, enjoining appellants and other defendants from committing asserted violations of the Interstate Commerce Act (Secs. 2, 3, 4, 6 (7) and 12, Title 49 U. S. C. A.)[1] and the Elkins Act, Secs. 1 and 3 (Title 49 U. S. C. A., Secs. 41 and 43)[2] The suit was brought by the United States at the direction of the Attorney General upon the request of the Interstate Commerce Commission, under Chapter 708, Sec. 3; 32 Stat. p. 848, Act of Feb. 19, 1903, as amended by Section 291, Chapter 231, Act of March 3, 1911 (abolishing Circuit Courts and making laws relative thereto applicable to District Courts) (Title 49 U. S. C. A., Sec. 43)[3] commonly known as the Elkins Act, to enjoin appellants and other defendants in the Court below from committing alleged violations of the Elkins Act and the Interstate Commerce Act. The jurisdiction

[1] Appendix, pp. 268-270.
[2] Appendix, pp. 266-268.
[3] Appendix, p. 265.

of this Court to hear this appeal is expressly conferred as of right by section 238 of the Judicial Code, as amended (43 Stat. p. 938, Chap. 229, Sec. 238, par. 1, Act of Feb. 13, 1925; Title 28 U. S. Code Annotated, Sec. 345)[1] and Chapter 428 of the Act of June 25, 1910 (36 Stat. p. 854; Title 49 U. S. Code Annotated, Sec. 44),[2] commonly known as the "Expediting Act," as amended by Sec. 291, Chapter 231, Act of March 3, 1911, 36 Stat. p. 1167, which abolished Circuit Courts and made laws theretofore relating to Circuit Courts applicable to District Courts; and Section 2, Chap. 544, Act of Feb. 11, 1903 (32 Stat. p. 823, Title 49 U. S. Code Annotated, Sec. 45;[3] as amended by Sec. 291, Chap. 231, Act of March 3, 1911, 36 Stat. p. 1167). The following cases sustain the jurisdiction of this Court to determine this appeal:

United States v. *Chicago, North Shore & Milwaukee Railroad Co.*, 288 U. S. 1; 53 Sup. Ct. 245; 77 L. Ed. 583;

United States v. *Elgin, Joliet & Eastern Railway Co.*, 298 U. S. 492; 56 Sup. Ct. 841;

Interstate Commerce Commission v. *Baird*, 194 U. S. 25;

United States v. *General Electric Co.*, 272 U. S. 476; 47 Sup. Ct. 192; 71 L. Ed. 362;

Atlantic Cleaners & Dyers, Inc., et al., v. *United States*, 286 U. S. 427; 52 Sup. Ct. 607; 76 L. Ed. 1204;

Swift & Co. v. *United States*, 276 U. S. 311, 322; 48 Sup. Ct. 311; 71 L. Ed. 587;

United States v. *California Canneries*, 279 U. S. 553; 49 Sup. Ct. 423; 73 L. Ed. 838.

[1] Appendix, p. 265.
[2] Appendix, p. 265.
[3] Appendix, p. 265.

III.

STATEMENT OF THE CASE.

Nature of the Case.

Appellant City of Kansas City, Kansas, a municipal corporation, acting under authority of state statutes, had constructed a modern produce dealers' and farmers' market on publicly owned lands in that City to satisfy public need therefor found to exist by United States Department of Agriculture. The approximate cost of $3,800,000 incurred in constructing the market was provided in part by a grant from the Public Works Administration of the United States of $1,710,000, $149,000 from general obligation bonds issued by the City, and $1,967,000, proceeds of the City's revenue bonds issued by it and sold to appellant Union Pacific.

Appellant City prior to the opening of the market being confronted with demands from prospective tenants for reimbursement for damages claimed to be sustained by them in moving to Appellant City's market on account of abandoned equipment, moving expense, and rental obligations, sought the judgment of the state Supreme Court, in a suit bronght by the Attorney General at the City's request, as to its authority to make such payments. Notwithstanding the decision of that Court in that case entitled *State ex rel. Parker* v. *Kansas City,* 151 Kan. 2; 98 Pac. (2d) 101, sustaining the City's authority under the statutes of the state and the ordinance of the City under which its bonds had been issued to make the proposed payments, the Court below, because of asserted participation of Union Pacific throughout the development and construction of the City's market, enjoined such payments upon the ground that they would constitute rebates, concessions, and discriminations pro-

ibited by Sections 2, 3, 4, 6(7), and 12 of the Inter-tate Commerce Act (Title 49, U. S. C. A., Secs. 2, 3, 4, 6(7), and 12) and Sections 1 and 3 of the Elkins Act (Title 49, U. S. C. A., Secs. 41 and 43). Appellees, Atchi-son, Topeka & Santa Fe Railway Company; Chicago, Burlington & Quincy Railroad Company; Guy A. Thomp-son as trustee of Missouri Pacific Railroad Company and the trustees of Chicago, Rock Island & Pacific Railway Company which claimed loss in traffic revenues derived by them at the Kansas City, Missouri, market on account of asserted diversion of traffic to Union Pacific were co-plaintiffs in the court below. Appellee City of Kansas City, Missouri, asserting damage to its market on account of the establishment of Appellant City's market was also joined as a co-plaintiff in the court below.

By its final decree, the District Court deprived the City of the power expressly conferred upon it by the statutes of the state to fix and determine the rentals of its market, and prohibited the City from leasing any portion thereof to shippers except upon the basis of rentals which would yield a "proper rate of return" upon the Court's valuation of the facilities, including the City's Public Levee land and the Grant from the Public Works Administration of the United States. The Court below expressly held that the schedule of rentals charged by the City violated neither the Elkins Act nor the Interstate Commerce Act (R. 340). It ruled that it had no power to fix future rentals but must confine itself to present facts (R. 337). Yet in its final decree the Court below enjoined rental of the market at rentals which did not yield a "proper rate of return" (R. 380).

THE COMPLAINT.

Allegations Dealing With the Kansas City, Missouri, Market and the Four Appellee Railroads.

It is alleged in the Complaint that the municipalities of Kansas City, Missouri, and Kansas City, Kansas, together with outlying cities, towns and communities forming the metropolitan area, for the past 80 years had been served by a food terminal located at 5th and Walnut Streets, in Kansas City, Missouri, owned and operated by the latter City, which is now engaged in improving its market at an expense of approximately one-half million dollars (R. 8). The business of the market is conducted by defendant produce dealers and others who occupy quarters rented from the City and premises owned or leased by them from private persons, in close proximity to the market proper (R. 8-9).

It is asserted that the Missouri market would be destroyed and irreparable injury visited upon produce dealers and property owners and upon the commerce and trade of Kansas City, Missouri, should the defendants succeed in carrying out the plan, agreement or conspiracy alleged in the Complaint (R. 9).

It is averred that the major portion of the food products bought and sold at the Kansas City, Missouri, market is transported in interstate and foreign commerce by Union Pacific and the four appellee railroads who have large sums of money invested in tracks, yards and other facilities for the handling of produce, and a large part of the investment of which would be irreparably and irretrievably lost should the alleged plan of the defendants be carried out (R. 9).

These allegations were deemed sufficient by the Court below to warrant joinder of appellee City and the four appellee railroads as co-plaintiffs in this proceeding allegedly brought for the enforcement of the Elkins Act and the Interstate Commerce Act.

Allegations As To the Kansas City, Kansas, Market.

It is alleged that in January, 1937, Union Pacific formulated a plan for transferring the produce terminal and food market serving the metropolitan area from its present location to the Public Levee in Kansas City, Kansas, at the junction of the Missouri and Kansas Rivers, in order to obtain for itself a larger proportion of the traffic moving to and from the metropolitan area (R. 9-10). The asserted plan contemplated that the Kansas City, Kansas, market was to be promoted, financed, constructed and operated jointly by Union Pacific and the City of Kansas City, Kansas (hereinafter called the City) on the Public Levee; and the capital investment was to be supplied by Union Pacific, various persons, firms and corporations, and governmental bodies other than the City (R. 10). It is alleged that in pursuance of the plan the following was accomplished:

(1) The City obtained authority from the legislature of Kansas to construct the market on the Public Levee by the enactment of Chapter 135, Laws 1937 (Sec. 13-1238 and Sec. 13-1244, G. S. Kan. 1937 Supp.)[1] and to issue revenue bonds for such purpose dependent for their security upon the revenue derived from the Public Levee (R. 10);

(2) The City being unable to sell to various investors $3,000,000 principal amount of revenue bonds issued by the City, Union Pacific purchased

[1]Appendix, pp. 271-275.

the bonds, approximately $2,000,000 of the proceeds of which were available to defray the cost of constructing the market and $1,000,000 was devoted to the refunding of prior Public Levee bonds issued for the construction of improvements previously made on the Public Levee (R. 11);

(3) The City and its officers applied to the Public Works Administration of the United States for a grant of $1,700,000 to assist in the construction of the market which the City secured with the aid and assistance of Union Pacific (R. 11);

(4) With the grant and revenue bond proceeds the City and its officers, in conjunction with defendant Union Pacific, constructed and are now constructing the public market and concurrently therewith the Union Pacific is constructing a team track, storage, reconsignment, and diversion yard at a cost of approximately $600,000 in pursuance of leases granted to Union Pacific by the City and its officers (R. 11-20);

(5) The market was formally opened for business on December 3, 1939, and was dedicated by the City, its officers and the Union Pacific (R. 12);

(6) The market is located solely on the lines of Union Pacific Railroad and is inconvenient of access to the other railroads in the metropolitan area (R. 12).

Alleged Inducements to Produce Dealers.

Between January 1, 1937, and "present time" DeOreo, Fean, Ulmann, Union Pacific and City (defendants below) offered, gave and granted cash payments, free rentals and other things to produce dealers to induce them to move to the new Kansas City Food Terminal and to divert their shipments of produce in interstate and foreign commerce from the lines of other railroads serving the market to the lines of the Union Pacific; produce

dealers solicited and accepted the inducements mentioned as a consideration for their moving to the new terminal and diverting their shipments from lines of other railroads to lines of the Union Pacific. Notwithstanding the inducements offered, a large majority of the produce dealers remained in their old locations (R. 12-13) and continued doing business with the appellee railroads; Union Pacific formulated a plan to give further and additional inducements to induce produce dealers to move and secured the consent of City to such plan (R. 13-14). Under this latter plan the rebates were to be in the form of cash payments and free rentals and other valuable considerations. The City appointed a committee of its officers authorizing and directing them to negotiate offers and make payments and arranged for transfer of the produce dealers to the new food terminal; the committee commenced negotiations and offered the rebates including payments in cash of $111,850 and in free rentals of $30,700 (R. 14); the City asked the Attorney General of the State of Kansas for an opinion as to the legality of the contemplated payments and free rentals; the Attorney General gave his opinion that such payments and free rents would violate the laws of Kansas and the covenant of the City with the holder of the bonds, which was that the bonds constitute a first lien and claim on the funds and the revenues of the Public Levee, subject to the payment of expenses of operation, maintenance and repair. The City then passed Resolution No. 11275 (attached to the Complaint as Exhibit "A," R. 25-27) which recited its contemplated action to make payment to prospective tenants (R. 15) due to rental obligations and cost due to the abandonment of equipment and facilities in their existing places of business and the good will appertaining thereto. By the resolu-

tion the Attorney General was requested to bring a proceeding in *quo warranto* to determine the legality of the City's contemplated plan; the Attorney General filed a petition in *quo warranto* in the Supreme Court of Kansas against the City challenging the legality of its plan and its authority under the Kansas statutes and bond ordinance (a copy of which is attached to the Complaint as Exhibit "B," R. 27-59; R. 16). The City filed its Answer (a copy being attached to the Complaint as Exhibit "C," R. 60-70), alleging that the plan was within the powers of the City under the statutes and ordinances, and that the bondholder recognized that the contemplated payments were not subject to the pledge or lien of the bonds. The answer alleged the City's purpose to make use of advance rentals derived from tenants of the Public Levee and the City's investigation and determination that the rates of rental established by it would be adequate to discharge all its obligations to the bondholder, make the proposed payments, and yield a substantial surplus.

It is asserted that the cold storage facilities were leased to City Ice & Fuel Company at a rental which did not yield the City a fair net return on the reasonable value of the storage facilities, by reason of which City Ice & Fuel Company is enabled to ship and receive freight over the lines of Union Pacific at rates which are less than its published tariffs (R. 13).

When the case was argued before the Supreme Court of Kansas, Thomas Lillard, an attorney for the Union Pacific, argued in support of the answer of the City that it had authority to expend such funds for such purpose as being necessary expenses of operation (R. 17). It is averred, by way of conclusion only, that Union Pacific as the holder of the revenue bonds thus waived its lien on the amounts to be thus expended (R. 17).

On December 21, 1939, the Supreme Court of Kansas handed down its *per curiam* decision dismissing the petition of *quo warranto* and upholding the right of the City to make the payments under the statutes and ordinance (R. 17).

It is alleged on information and belief that the sum of $111,850 to be used by the City in making the proposed adjustments was being contributed directly or indirectly by Union Pacific and is a device, disguise and cloak to cover the real method by which the fund is being raised (R. 18). It was asserted that the City had admitted that the firms to whom the payments were proposed to be made transacted more than 50% of the produce business on the Kansas City market and shipped more than 7500 cars of produce a year, and neither the City nor Union Pacific would obtain anything of substantial value except traffic.

Alleged Violations of the Elkins Act and Interstate Commerce Act.

The claimed violations of the Elkins Act and the Interstate Commerce Act, asserted by way of conclusion only, are:

(1) That because of the part played by Union Pacific in the promotion, financing, construction and operation of the market and its construction of the team track yard, defendant Union Pacific is a participant with the City in a joint adventure and as such is jointly and equally responsible with the City for the offers of cash payments and reduced and inadequate rentals (R. 19);

(2) That Union Pacific is a participant in such offers because as the holder of revenue bonds it consented to the use of moneys from the Public Levee revenues (R. 19-20);

(3) That the participation by Union Pacific in assisting the City to raise the sum of $111,850 renders it a participant in the payments (R. 20);

(4) That the course of transactions between the railroad, the City, its officers, and DeOreo and Fean, is a subterfuge, scheme and device for making unlawful payments and gifts to shippers whereby Union Pacific, as a common carrier, would be caused to transport freight between given points at less than its published tariffs and commit discriminations forbidden by law (R. 20);

(5) That defendant produce dealers are guilty of violating the law because of their solicitation of such cash and free rentals from the City (R. 20-21);

(6) That the whole course of transactions constitutes a conspiracy to violate the Interstate Commerce Act and the Elkins Act which prohibit offering, granting, giving or soliciting, accepting and receiving rebates, concessions and advantages, whereby Union Pacific Railroad Company as a common carrier would be caused to transport freight at less than its published tariffs (R. 22).

The Prayer for Relief.

It was prayed that the defendants be restrained and enjoined:

(1) From giving or receiving any cash payments or reduced rentals or inadequate rentals or unsecured loans, in consideration of the transfer of the places of business of defendant produce dealers to the new Kansas City, Kansas, market (R. 23);

(2) From leasing the market and cold storage facilities for an amount insufficient to produce a reasonable return on the cost or value of such facilities (R. 23-4).

It was further prayed that the produce dealers be restrained from moving their places of business to the new market in furtherance of the arrangement, plan, scheme or device; that the leases to the produce dealers be adjudged null and void (R. 24); that defendant produce dealers return to Union Pacific, DeOreo, Fean, Ulmann and the City all checks, cash, notes and other things of value theretofore received and that the latter defendants be directed to receive and accept the return thereof (R. 24).

THE ANSWER OF THE CITY AND ITS OFFICERS.

After challenging the jurisdiction of the Court and the sufficiency of the Complaint to state a claim upon which relief could be granted against them (R. 121) the City and its officers in their Answer specifically denied that they or any of them offered, granted, gave, solicited or accepted any rebates or concessions relating to the transportation of property in interstate or foreign commerce in violation of the laws of the United States (R. 122). They denied that the market located upon the Public Levee in said City and operated by the City under authority conferred by the statutes of Kansas, was under the jurisdiction of the Interstate Commerce Commission or of the District Court of the United States for the Western District of Missouri and that they are, or at any time have been, engaged in the transportation of property in interstate of foreign commerce (R. 122-3). They denied the existence of a joint venture between the City and Union Pacific in the operation of the market, and asserted that the market was operated solely by the City on its Public Levee property (R. 123-4). They further denied participation of Union Pacific in the promotion, financing, construction and operation of the market except the purchase of the revenue bonds (R. 124). It was alleged that the City made a contract with Fean and De-Oreo as leasing agents which was subsequently cancelled because of requirements of the Public Works Administration (R. 124-5).

It was affirmatively alleged that the City had entered into a lease with Union Pacific set out in Ordinance No. 30276 for the rental of grounds on the Public Levee, under which the railroad was to pay a fixed annual rental to the City of $10,760 for a term of 30 years and under

which it was obligated to construct at its expense a team track yard to serve the market (R. 123-4), which would be open to the cars of all railroads entering Greater Kansas City, and required Union Pacific to switch with expedition and without discrimination, at rates provided in lawfully published tariffs, all cars destined to or originating on trackage serving the market. The failure of Union Pacific to comply with this requirement entitled the City to terminate the lease (R. 147-8).

It was alleged that on November 16, 1939, Howard Payne, City Clerk, Alton H. Skinner, City Attorney, and Truman B. Schlup, City Engineer, being appointed as a committee to investigate leases for space on the market, investigated offers to lease, tendered by prospective tenants, and made a report to the governing body of the City of the facts ascertained by them (R. 126).

It was denied that the committee was appointed to negotiate with produce dealers for the purpose of offering them large sums of money and other things of value to transfer their places of business to the Kansas City, Kansas, market (R. 126).

It was alleged in the City's answer that beginning in the year 1934 it undertook a comprehensive program for the development of the Public Levee for the purposes for which it was dedicated by the founders of the original Town of Wyandotte, the first major improvement being a street constructed in a north and south direction through the Levee, including a bridge across Jersey Creek, the cost of which was provided by a grant of money from the Public Works Administration and by funds provided by the City (R. 128-9); that subsequently a viaduct was constructed by the joint efforts of the City, the State Highway Commission, and the Federal Government (R.

129); that in the years 1935 and 1936 the City built a grain elevator with a railroad track and a grain elevator dock located on the Missouri River, to which grain could be transported from the grain elevator for loading on barges at the dock (R. 129-30). In 1934 the City first gave consideration to the construction of a food market, but before reaching a conclusion it made a comprehensive investigation, during which it consulted experts, including representatives of the United States Department of Agriculture (R. 130); that the investigation disclosed a public need for modern and adequate market facilities to serve the territory tributary to Kansas City, and that the Public Levee was a convenient and accessible place to construct such market (R. 130).

It was averred that the City after making application to the Public Works Administration of the United States for a grant, received an offer of a grant under date of October 24, 1938, which it accepted (R. 130).

The total cost of the improvements made by the City on the Public Levee was $5,687,300, of which the United States contributed $2,224,300, the City paid $463,000 from the proceeds of its general obligation bonds, and $3,000,000 proceeds of revenue bonds duly issued by the City (R. 130).

It denied that Union Pacific entered into any plan with it whereby the development of the Public Levee was to be carried out through the joint efforts of the Union Pacific and the City (R. 131).

The City denied that it was unsuccessful in attempting to sell the revenue bonds because of the inadequacy of the security and that the bonds were unmarketable (R. 131).

It was alleged that advertisement for the sale of the $3,000,000 principal amount of revenue bonds being duly

made and bids received, Union Pacific was the highest and best bidder; that the sale was thereupon made to it as authorized by Ordinance No. 30206, as amended, and Ordinance No. 30251 of the City, which had been approved by the Supreme Court of Kansas in *State ex rel. Beck* v. *Kansas City et al.*, 149 Kan. 252, 80 Pac. (2d) 476 (R. 132).

It was admitted that the market opened for business on December 3, 1939; denied that it was dedicated jointly by the City and Union Pacific, and affirmatively alleged that it was dedicated by the City as the owner thereof (R. 134).

It was denied that the market was so situated as to be inconvenient of access to other railroads and affirmatively alleged that in the grant made by the Public Works Administration it was required that the rail facilities be available to all railroads upon fair and reasonable terms, without discrimination, and that all contracts for services by railroads shall be satisfactory to the Administrator (R. 134). It was alleged that tariffs governing switching charges have been filed by Union Pacific and concurrences therein have been duly filed by all railroads entering the Kansas City area (R. 134-5).

It was denied that Union Pacific, the City and its officers gave and granted or offered to give and grant cash and free rentals as an inducement to produce dealers to move to the Kansas market, or that payments on account thereof were solicited by produce dealers (R. 135).

It was affirmatively alleged that the City Attorney was directed by its governing body to consult with the Attorney General of the State of Kansas for his opinion regarding the legality of the action proposed to be taken by the City in negotiating with produce dealers, and that

the Attorney General stated that the matter should be submitted to the State Supreme Court and if request was made of him by the City's Commissioners he would institute a *quo warranto* proceeding to have that question determined (R. 136).

The allegation of the complaint that in the argument before the Supreme Court the attorney for Union Pacific argued in support of the Answer of the City and thereby waived the lien of the claim of Union Pacific, as the holder of the revenue bonds, upon the revenue funds to be expended for making settlements was denied (R. 138).

It was denied that the sum of $111,850 was to be furnished directly or indirectly by Union Pacific and that any scheme or plan existed whereby such payment was to be used as a device, cloak or scheme to pay rebates (R. 139).

It was alleged affirmatively that after the City's application had been made to the Public Works Administration for a grant to build the market plaintiff railroads and the City of Kansas City, Missouri, in cooperation with each other and the North Side Business & Improvement Association had by threats and intimidation to tenants of the Kansas market sought to prevent them from conducting business there (R. 139-40). It was affirmatively alleged that in the negotiations with prospective tenants the City endeavored to settle claims for damages and acted in good faith pursuant to the authority held to have been conferred upon it by the statutes of Kansas, as construed by the Supreme Court of the State in *State ex rel. Parker* v. *City of Kansas City, Kansas,* 151 Kan. 1, 98 Pac. (2d) 101 (R. 140). The City and its officers specifically denied that they negotiated for or offered or

gave any sums of money to prospective tenants as rebates, concessions, advantages or discriminations in respect to the transportation of property in interstate or foreign commerce, or that any understanding, agreement or arrangement was entered into between them and others with reference thereto (R. 140).

Other allegations of the Complaint were denied.

ANSWER OF UNION PACIFIC.

The allegations of the Complaint that Union Pacific has entered into any joint venture with the City of Kansas City, Kansas, in the promotion, development, construction and operation of the Kansas City, Kansas, Food Market were denied (R. 109), and it was affirmatvely alleged that the market was constructed, owned and operated by the City (R. 109). All charges in the Complaint that Union Pacific entered into any conspiracy or plan with the City or anyone else to violate the Elkins Act or the Interstate Commerce Act were denied (R. 117-120).

It was affirmatively alleged that Union Pacific has constructed and now operates a team track yard immediately adjacent to the Kansas City, Kansas, market, connecting with trackage owned by the City and operated by the railroad to serve the market pursuant to a written lease entered into by it with the City (R. 110-1) under the terms of which the team track yard is open to all railroads, and Union Pacific is required to switch with expedition and without discrimination the cars of all railroads, at rates provided in lawfully published tariffs (R. 111). The provision authorizing the City to terminate the lease for default therein on sixty days' notice was in conformity with the requirement of the Federal Emergency Administrator of Public Works in the grant made to the City to provide funds for the construction of the market and (R. 111) the lease was approved by the Federal Emergency Administrator of Public Works as a compliance with the terms of the grant (R. 111).

The Railroad Company admitted that it purchased, at public sale, $3,000,000 principal amount of Public Levee Revenue Bonds issued by the City in pursuance of statutory authority and that of the proceeds derived there-

from the City used $1,967,000 to defray construction cost of the market and $1,033,000 to pay and discharge Public Levee Revenue Bonds previously issued by it (R. 114); that the City made application for the grant which it received and used to pay in part the cost of constructing the market (R. 114-5).

It was affirmatively alleged that for many years the facilities existing in the Kansas City metropolitan area for the transportation, handling and delivery of produce were inadequate, resulting in great waste, delay and unnecessary expense, not only to produce dealers but also to rail carriers serving the market (R. 115), and that when it was proposed to build a modern, well located and accessible market and to attempt to obtain a public grant in aid thereof, Union Pacific advised with, and attempted to aid the City in obtaining the public grant and tendered advice to the City as to design and construction thereof, to the end that the market when constructed would provide modern, convenient and accessible facilities for the handling of produce by produce dealers and growers in the producing territory (R. 115).

It was admitted that when the case of *State of Kansas ex rel. Parker* v. *City of Kansas City, Kansas,* 151 Kans. 1, 98 Pac. (2d) 101, was argued December 19, 1939, Thomas M. Lillard, one of the railroad's lawyers, was present and in response to an inquiry by the Court participated in the oral argument, but it was denied that thereby or otherwise any lien, charge or claim of Union Pacific as the holder of the revenue bonds was in any manner waived, qualified or impaired (R. 119).

All other allegations of the Complaint were expressly denied.

ANSWERS OF OTHER DEFENDANTS.

All of the other defendants filed separate answers. They each denied that any payments or offers of payment were made to or solicited by them or any of them from the Union Pacific and that they had violated or entered into an agreement or conspiracy to violate the Elkins Act or the Interstate Commerce Act. Inasmuch as these defendants have taken no appeal from the final decree it is deemed unnecessary to go into further detail respecting the answers filed by them.

THE EVIDENCE.

Dedication of Public Levee Lands, Their Condition and Use.

In 1857 the platters of the original Town of Wyandotte, now Kansas City, Kansas, dedicated a tract of land now comprising approximately 102 acres as a Public Levee (U. P. Ex. 347, R. 3758; offered, R. 1356) upon a portion of which the City in the development thereof, to make it available for public use, constructed a modern public food market. Prior to its development, the eastern part of the Public Levee was used as a public dump and occupied by squatters (R. 741; 879). For many years portions of the Levee were occupied by railroad tracks of the Edgewater Connecting Railroad, owned by appellee Missouri Pacific, Kansas City Southern, and Missouri and Kansas Terminal Railroad Company, but despite franchise obligations, no development of the property had been accomplished (R. 755; 896).

Plan for Development and Improvements Made.

In 1924 a Ten Year Plan of development of trafficways leading to the Public Levee and central industrial districts of Kansas City, Missouri, and Kansas City, Kansas, was formulated (R. 747). A contract entered into in 1924 for the development of the Public Levee was terminated in 1929 without any improvement having been made (R. 741). The Regional Bridge was constructed in 1932 across the Missouri River north of the Levee and the adjoining Fairfax Industrial District connecting with trafficways then being constructed under the Ten Year Plan. The City constructed a bridge over Jersey Creek (R. 742; K. C. K. Ex. 114, R. 2892; offered, R. 743) and an extension of Minnesota Avenue (the prin-

cipal trafficway of the City) from the east line of Third Street to a point in the north City Limits where the street connects with Fairfax Road leading to the Regional Bridge (R. 743; K. C. K. Ex. 115, R. 2892; offered, R. 743).

Cooperation With Federal Emergency Relief Program of the United States to Relieve Unemployment.

The passage of the National Industrial Recovery Act to relieve unemployment by the construction of worthwhile public improvements gave impetus to the further development of the Public Levee. To enable the City to cooperate with the Federal Emergency Relief program of the United States, necessary legislation was enacted at the special session of the Kansas legislature in 1933 at the instance of the City, with the cooperation of representatives of the Chamber of Commerce, Stanley, an officer of Union Pacific, and others (R. 742; Pl. Ex. 252, R. 3129; offered, R. 1156).

River-Rail Elevator.

The Federal Government had expended between fifty and sixty million dollars on the Missouri River between St. Louis and Kansas City in making the stream navigable and because of its operation of the Federal Barge Line it was seeking downstream tonnage (R. 880). The Waterways Committee of the Chambers of Commerce of both Kansas City, Kansas, and Kansas City, Missouri, advocated a grain elevator on the river (Pl. Ex. 252, R. 3125; offered, R. 1156). The City officers conferred with O. H. Horner, an eminent elevator engineer, regarding construction of a wharf and dock with grain elevator

terminal dock on the Public Levee to handle grain from rail to river, to obtain benefits accruing from water transportation (R. 742-3; 880-1; 957-8). This improvement was financed by a grant from the Public Works Administration of $482,000, the sale of Public Levee Revenue Bonds of $1,054,000, purchased by the Public Works Administration (later sold to the Reconstruction Finance Corporation), and of $300,000 general obligation bonds of the City (K. C. K. Ex. 147, R. 2898; offered, R. 758; Pl. Ex. 62-C, R. 2702; offered, R. 474; K. C. K. Ex. 122, R. 2894; offered, R. 745).

In prosecuting its application for the loan and grant for the elevator, the City requested and received assistance from prominent State and Federal officials, W. J. Breidenthal, Chairman of the Industrial Committee of the Chamber of Commerce of Kansas City, Kansas, who had spent largely of his own time and money in promoting many public projects of the City and County, including the improvements on the Public Levee, Stanley, and others (R. 664; 757).

Interest of Union Pacific Railroad Company and Its Subsidiary, The Kansas City Industrial Land Company in the Development of the Public Levee as Entrance to the Fairfax Industrial District.

In 1923 the Fairfax Drainage District was organized for the purpose of reclaiming and protecting some 1700 acres of land immediately north of and abutting the Public Levee. Guy E. Stanley and associates interested Union Pacific in the purchase and development of approximately 1200 acres of this land for use as industrial property. The Kansas City Industrial Land Company was organized, Union Pacific purchasing $600,000 of its capital stock, and Stanley and his associates $300,000. The property was designated as The Fairfax Industrial District. Union Pacific built trackage immediately adjacent to the Public Levee to serve the District and began its development (R. 1095-6; 1024-5).

In 1931 Stanley became and still is an Executive Assistant of Union Pacific at Kansas City, reporting to J. L. Haugh, Vice-President of Union Pacific and President of the Kansas City Industrial Land Company (R. 1023; Pl. Ex. 36, R. 2271; offered, R. 422). In improving access to the Industrial District and in the hope of attracting industries to the lines of Union Pacific, Stanley, Haugh and other officers of Union Pacific actively cooperated with and encouraged the City in its plans for the development of the Public Levee. The City officers recognized that Kansas City was the eastern terminus of Union Pacific, that it was not competing for the handling of traffic eastwardly, and would therefore have no traffic interest adverse to the City's plans for industrial development of the Levee property (R. 796).

The activities of Union Pacific officers were recorded in detail in inter-office correspondence and accounting

records[1] made available to Examiners of the Interstate Commerce Commission and by them, under Order of the District Court (R. 408) disclosed to the competing appellee railroads. These were admitted in evidence over the objections of appellant City set forth in Assignment of Error No. 26 (R. 390-1, 413-20).

Financial Assistance of Union Pacific in Developing the Elevator Wharf and Docks.

Because of the Kansas cash basis and budget laws, the City was without funds to finance preliminary expenses of this development. Some of the funds therefor were advanced by The Kansas City Industrial Land Company on request of City officers (Pl. Ex. 252, R. 3148; offered, R. 1156; Pl. Ex. 37, R. 2273-8; offered, R. 422; R. 788; 882; 961) upon the understanding that same would be repaid by the City out of the proceeds of the loan (Pl. Ex. 252, R. 3148; offered, R. 1156). These advances were not repaid as a later ruling of the Public Works

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[1]

Plf. Ex.	R.	Offered R.	Plf. Ex.	R.	Offered R.
2	1484	413	24	2137	419
3	1533	"	25	2147	"
4	1555	414	26	2165	"
5	1577	417	27	2173	"
6	1603	418	28	2181	"
7	1640	"	29	2214	420
8	1671	"	30	2222	"
9	1685	"	31	2233	421
10	1709	"	32	2253	"
11	1745	"	33	2259	"
12	1765	"	34	2264	"
13	1788	"	35	2268	422
14	1963	419	36	2271	"
15	2006	"	37	2272	"
16	2031	"	38	2285	"
17	2040	"	39	2287	423
18	2073	"	40	2297	"
19	2080	"	41	2312	"
20	2083	"	42	2316	"
21	2099	"	43	2321	"
22	2115	"	44	2325	"
23	2128	"	45	2329	424

Administration prevented use of Construction Funds for preliminary expenses, but will be repaid out of the Public Levee Revenue Fund of the City (R. 883).

City's Action to Eliminate Unused Railroad Franchises on the Public Levee.

To enable the City to plan a systematic development of the Public Levee, the Mayor and City Attorney were directed by the City to terminate unused railroad franchises by negotiation or litigation if necessary (R. 755, 896). As a result, Kansas City Southern and Missouri and Kansas Terminal Railroad Company abandoned their franchises. Missouri Pacific (as successor in interest to the Edgewater Connecting Railroad) had filed suit in the United States District Court to enjoin the collection of special assessments against its franchises (R. 756). In settlement of that case Missouri Pacific by stipulation relinquished all of such franchise rights except for 350 or 400 feet at the north end, in consideration of release of liability for the assessments (R. 756; K. C. K. Ex. 267, R. 3254; offered, R. 1197).

Trackage Serving the Elevator and Easterly and Southerly Portion of the Levee.

It being necessary for the City to have railroad service available for the river-rail elevator with a solvent lessee as required by the Public Works Administration, it entered into a contract with Union Pacific, which had no elevator on its line to compete with the City's elevator on the Levee (R. 794-5, 862; Pl. Ex. 23, R. 2128; offered, R. 419). Another contract was made between the City, Union Pacific, and Missouri Pacific, covering the lease of a portion of the Levee for drill tracks south of Jersey

Creek and east of Minnesota Avenue (R. 757; Pl. Ex. 25, R. 2147; offered, R. 419) at an annual rental of $3,000 (R. 757). Missouri Pacific required that its obligation should cease upon termination of pending proceedings for its reorganization under the Bankruptcy Act. Union Pacific was required in that event to purchase the interest of the Missouri Pacific in the jointly owned tracks and assume obligation for the full rental (Pl. Ex. 25, R. 2163; offered, R. 419). Mr. Lang (Laing) of the Public Works Administration advised the City that he would not approve the lease with the Missouri Pacific unless Union Pacific was obligated for the total rental (R. 961).

Plans of Fean and DeOreo for developing a Market in the Kansas City Area.

During January, 1937, while the river-rail elevator was in the process of construction, defendants Fean and DeOreo called on Stanley, having been referred to him by a traffic representative of Union Pacific in Cleveland, seeking a location to develop a food market in Kansas City (Pl. Ex. 2, R. 1489; offered, R. 413). Stanley showed them various locations, including the Fairfax Industrial District, the Public Levee, and other sites in Kansas and Missouri (R. 1027).

Fean and DeOreo, after making independent investigations of suitable locations, (R. 1027) considered the Public Levee the most desirable site available (R. 1027; Pl. Ex. 2, R. 1497; offered, R. 413). At their request, Stanley introduced them to the City officers (R. 1028; Pl. Ex. 2, R. 1500; offered, R. 413), with whom they discussed various plans for their contemplated development (R. 1028). City officers and others, including representatives of the Union Pacific, accompanied Fean and

DeOreo on two trips to inspect eastern markets (R. 1028). Among others on these trips they interviewed Swartz, Manager of Santa Fe Terminal at Chicago, regarding the operation of that terminal (Pl. Ex. 2, R. 1513; offered, R. 413).

The original plans of Fean and DeOreo contemplated they would buy land and finance the market with their own bond issue (R. 1027). Learning that the Public Levee site could not be sold, they later discussed with the City the possibility of its financing and constructing the market and giving them a 99-year lease (R. 618).

While this plan was being discussed in 1937, DeOreo organized a Merchants' Committee of five to assist in developing the project, promising to pay the members $5,000 each, either in cash or stock in the market enterprise, depending on how things worked out. He also promised the committee an interest in the restaurant, cigar stand and other concessions in the contemplated market (R. 619), and DeFeo, one of the committeemen, the job as market master (R. 620). After the City decided to build and operate the market and had employed Fean and DeOreo as its leasing agents, in June, 1938, some of the committeemen demanded and were given written agreements with Fean and DeOreo personally for the payment of $5,000 each payable from such commission as might be paid to DeOreo and Fean by the City (R. 621; Pl. Ex. 89, R. 2759; offered, R. 621; Pl. Ex. 90, R. 2760; offered, R. 621). No payments have been made under these contracts (R. 621). Union Pacific had no knowledge of these arrangements and did not suggest the same (R. 1032).

Plans of the City to Build the Market.

Additional legislation was necessary to permit the City, in cooperation with the Federal Government, to finance the market and refund the outstanding Revenue Bonds. An amendment to the Kansas Statutes incorporating suggestions of Counsel for the Public Works Administration was enacted at the 1937 session of the Kansas legislature. City officers, Stanley, Breidenthal, and others supported the amendments (R. 764-5; Pl. Ex. 2, R. 1501-4; offered, R. 413).

Fean and DeOreo in 1937 circulated a paper known as "Declaration of Policy," which was signed by 69 produce dealers (Pl. Ex. 91, R. 2762; offered, R. 622), stating the present need for a modern wholesale food market with modern buildings, parkings, wide paved streets, office space, facilities for allied lines of food business and space for farmers, with facilities for inspection and team tracks for 300 or more cars, open to all railroads, an auction house and cold storage plant.

A mimeographed form of lease from the City to prospective tenants was later prepared by City Attorney Skinner (R. 796-7) and furnished through Stanley (R. 622; Pl. Ex. 92, R. 2763; offered, R. 622) to DeOreo who secured leases on 80% of the units of the market on this form (R. 622).

In June, 1937, Breidenthal and Skinner presented an application of the City to the Public Works Administration to supplement the loan and grant on the elevator to provide funds for the construction of the market. (Pl. Ex. 2, R. 1532; offered, R. 413; R. 775).

Union Pacific's Study of the Market.

Investigation by Union Pacific officials of other markets developed that location of a perishable market on its line might result in an increase of its road haul traffic. They were informed that the Chicago Produce Terminal, jointly owned by the Santa Fe and Illinois Central, had increased the perishable business at Chicago by eliminating the necessity for inspecting shipments at team tracks scattered at 6 or 8 different yards, and that a similar result had been produced at Detroit, Cleveland, and Buffalo (Pl. Ex. 2, R. 1512-15; offered, R. 413). Its officers contemplated the development of a large national market by which a substantial increase in the perishable traffic handled from the coast through the Kansas City gateway would result (Pl. Ex. 15, R. 2007; offered, R. 419; R. 1094-5). Union Pacific's officers, actively assisted the City in presenting its application to Public Works Administration and in preliminary plans for the market. The interest of Union Pacific was promptly disclosed to the Public Works Administration (R. 1190).

Investigation and Recommendation by Department of Agriculture of the United States.

Through Breidenthal, the City arranged with the Secretary of Agriculture for a survey of the market situation in the Kansas City area, which was made by William C. Crow of that Department, assisted by representatives of the Colleges of Agriculture of the Universities of Kansas and Missouri (Pl. Ex. 3, R. 1538; offered, R. 413; R. 888).

Crow, a witness for the City, testified that his investigation was for the purpose of determining the

public need for a market and a suitable location therefor. He investigated locations, both in Kansas and Missouri, but was not interested in which city it was located (R. 995). He urged upon officials of both cities the need of an improved market from the standpoint of consumers, farmers, and dealers (R. 996). After investigation, which developed the inadequacy of the Missouri market, he asked City officials of Kansas City, Missouri, whether they intended to build a wholesale market to correct this inadequacy. He was told by them that Kansas City, Missouri, had traditionally been interested in a retail market, including a farmers' retail market which it intended to build, but it did not intend to build a wholesale market (R. 989). He endeavored to encourage them to expand their plan to include a wholesale market and was told that they had only $500,000 available for a retail market and were not interested in a wholesale market. He learned in the office of the City Administration in Kansas City, Missouri, that an organization of individuals, principally property owners in the north side of Kansas City, Missouri (known as the North Side Business Men's Improvement Association), were interested in proposals to change the existing market, because the City contemplated using its market site for a retail market and had no plans for a wholesale market, but that the plans of the individuals were not given official recognition by the City. He concluded it was his job to find out what the association contemplated doing, because it made no difference who operated the market if built efficiently and operated in the public interest. He went to the association's office, where he was shown plans of a development outside the market owned by the City. He endeavored to ascertain if any real effort was being put

forth upon this unofficial program. He determined that the City Administration was not sponsoring the plans and that the people who had them drawn had no method of financing. He then called on Mayor McCoombs and inquired if he would be willing to cooperate with Missouri if they could be persuaded to build a new market. McCombs advised him that "If Kansas City, Missouri, will build a wholesale market, we will not only cooperate with them if they want us to, but if they will build it without us, we will withdraw and not make any attempt to build a wholesale market". (R. 989-991).

Among the inadequacies of the Missouri market was the lack of rail facilities, the necessity of trucking from several team track yards located from one-half to two miles from the market area at a cost of about $20 per carload, aggregating about $150,000 per year (R. 991-2) in addition to the deterioration, delay and inconvenience (R. 992).

Crow studied the preliminary plans, made many suggestions (R. 999), and insisted upon direct rail service to the produce buildings despite contention of Union Pacific that this plan was not feasible (R. 998). He insisted that the market should be open to all railroads (R. 999); inquired of the Interstate Commerce Commission whether Union Pacific, if it laid the tracks to serve the market, could bar other railroads from serving it; and was told that it could be forced to switch cars of other railroads only by contract with the City (R. 999). He advised Mayor McCombs that unless the market was open to cars of all railroads, the Department of Agriculture would not give its approval, and urged the Public Works Administration to require assurance that the market would be so open (R. 1000).

He visited the new market after its construction and

found that for the most part it corrects the inadequacies of the old market, with rail facilities for direct unloading from cars, eliminating cartage, delay and spoilage, and learned from dealers that a car could be unloaded in 33 minutes and cost nothing because it could be unloaded with the idle time of employees (R. 1000). In Crow's report published by the Department of Agriculture he had stated "there will be some difficulty in inducing dealers to move from the established market to any new location wherever it is" and in explanation stated that in every place where he had worked, including this, he had found that there was a reluctance on the part of dealers to move to a new location which was usually generated by the owners of property in the area (R. 1003).

Reed, an Agricultural Agent of Union Pacific, was in Kansas City and made a report to his superior on August 7, 1937, of his assistance to Crow (Pl. Ex. 14, R. 1981-92; offered, R. 419).

Crow testified that no information supplied by Reed was used in the former's report (R. 988); that Reed did not assist in making the study (R. 988); that he knew nothing of what Reed was doing (R. 1010); that he spent no great amount of time with Reed (R. 1013); and he discussed his findings with no one except Haig and Parsons of the Colleges of Agriculture of the two states (R. 1013); and that his impression of Reed's letter was "that Mr. Reed is taking a great deal of responsibility for what went on with respect to things that he had nothing to do with and was not in on their being carried out" (R. 1013).

In response to his inquiry concerning the pending application before the Public Works Administration, Henry A. Wallace, Secretary of Agriculture, wrote Senator

McGill, under date of September 27, 1938, advising of the interest of his Department in improving markets for the purpose of producing economies in marketing and distribution, stating that the market then serving the Kansas City area was inadequate; that it was not located on a railroad; that produce arriving by rail must be trucked to wholesale stores through congested traffic at a cost of around $150,000 a year; and that "costly spoilage results from this unnecessary handling." The Secretary also pointed out that the farmers had no suitable place to sell their wares; that the stores were not properly equipped for handling perishable products; and that the trade had been complaining about unsatisfactory conditions. He commended the proposed market in Kansas City, Kansas, and compared it with the counter-proposal of Kansas City, Missouri, stating that the latter would not be satisfactory either to farmers or wholesalers, and urged the approval of the Kansas project to relieve difficulties existing in the old market (Pl. Ex. 13, R. 1874; offered, R. 418).

Negotiations With Investment Bankers With Respect to Revenue Bonds.

Upon advice that the market and elevator projects could not be consolidated with the pending application on the elevator a new application was filed (R. 888) for a loan and grant. Later an amended application for a grant only was filed because the City had been informed by Stifel, Nicolaus & Company, investment bankers of St. Louis, that revenue bonds could be sold (R. 888-9). Negotiations carried on with Stifel, Nicolaus by the City resulted in the former's proposal to purchase $3,000,000 principal amount of Public Levee Revenue Bonds which

was accepted by the City (Pl. Ex. 62-B, R. 2550-4; offered, R. 474).

From the commencement of the negotiations until the grant was made, Stifel, Nicolaus, through Haugh and Stanley, endeavored to induce Union Pacific either to guarantee the interest on the revenue bonds or to lease property on the Levee at sufficient rental to accomplish the same purpose (R. 485-8). Accordingly, Haugh made frequent estimates of prospective revenues from and expenses of operation of the market (R. 1106).

In May, 1937, while lease by the City to an operating company was under consideration, Stanley suggested the Land Company lease the project which in his opinion would fully pay out and return a very substantial profit (Pl. Ex. 2, R. 1522; offered, R. 413). Haugh, concurring in conclusion that the dealers' units should be profitable on the basis of information obtained in the Cleveland and Buffalo terminals, preferred that the Land Company should not lease the facilities. He suggested that the proposed operating company should make a firm offer for a lease accompanied by a satisfactory financial statement, a detailed estimate of revenues and expenses, and evidence that substantial dealers would take space in the new facilities (Pl. Ex. 2, R. 1523; offered, R. 413).

In July 1937, Haugh suggested the annual rental would have to cover interest and amortization; that the operating company be required to furnish a guaranty in the form of bonds or otherwise that its lease would be carried out and that Fean should establish rental which would be sufficient to cover normal occupancy, a flat rent to be paid to the City, plus operating expenses, insurance, etc., and a reasonable operating profit (Pl. Ex. 3, R. 1539-40; offered, R. 413).

In March, 1938, he suggested a rental on the store units of $175 per month, plus the cost of policing and street cleaning, and requested information whether 80% of the units could be leased at this rental (Pl. Ex. 13, R. 1843; offered, R. 418). On advice that the City contemplated increasing the commission to its leasing agents above the 5% theretofore estimated, he suggested an increase to $200 per month (Pl. Ex. 13, R. 1843; offered, R. 418).

In May of 1938, City Commissioners established a rental of $150 per month (Pl. Ex. 5, R. 1591; offered, R. 417).

Stifel, Nicolaus suggested that prospective rentals of the market facilities would not be accepted by bond buyers, because they were not of a permanent enough nature to support the bonds through the 30 year period, and insisted that the Union Pacific should pay $40,000 per annum rental for the team track yard, less rentals to be collected by the City over and above $172,800 per annum, with a minimum of $10,760 per annum. The $40,000 was the difference between their assured long term rental and the interest on the proposed bonds. It was approximately at the rate of 3.6 cents per square foot, which the City had established as a basis for the leasing of the filled Public Levee land (Pl. Ex. 28, R. 2187; offered, R. 419; K. C. K. Ex. 148, R. 2899; offered, R. 758).

Union Pacific estimated the City's net operating income at $300,987 per year and interest and amortization on the revenue bonds at $172,800 (Pl. Ex. 28, R. 2188; offered, R. 419).

Union Pacific authorized the lease of the team track yard on the Levee at a minimum annual rental of $10,760 and a maximum of $40,000 per annum (Pl. Ex. 29, R. 2216; offered, R. 420).

In Plaintiff's Exhibit 68 (R. 2728-34; offered, R. 497) furnished to Stifel, Nicolaus by the City, the rental from Union Pacific was calculated upon this basis, a prospective rental of the cold storage plant at $53,000 per annum, and rentals from produce dealers' units at $150 per month per unit on the basis established by the City. When it developed that the cold storage plant could not be leased on this basis, Stifel, Nicolaus demanded an increase in Union Pacific rental, which Union Pacific would not make because, to the extent it exceeded the rental value of the property, it might amount to a guarantee requiring Interstate Commerce Commission approval, and the time prescribed for compliance with the grant of the Public Works Administration would not permit such an application (R. 496). The lease finally executed between the City and Union Pacific provides for a fixed annual rental of $10,760 (Pl. Ex. 62-B, R. 2606-15; offered, R. 474).

Thoron, Director of the Finance Division of the Public Works Administration, advised the bankers, and Breidenthal and McCombs, that the commitment of Stifel, Nicolaus & Company "did not appear to him to be a real commitment" (R. 1191). On September 27, 1938, McCombs, Breidenthal, Haugh and Skinner delivered to him a new commitment from Stifel, Nicolaus & Company making its terms unconditional, except the requirement of an approving legal opinion and the delivery of the bonds within 40 days from its date (July 26, 1938) (R. 1191; Pl. Ex. 266, R. 3251; offered, R. 1195). On September 30 Cravens of Stifel, Nicolaus advised Thoron that theirs was a firm commitment and that it would be extended (R. 1191).

On October 3, 1938, the Mayor transmitted a telegram

from Stifel, Nicolaus & Company, extending its commitment to October 12, 1938 (K. C. K. Ex. 218, R. 3023; offered, R. 901).

City's Contract With Leasing Agents.

During the negotiations with Stifel, Nicolaus & Company, the City Commissioners appointed a committee of citizens to advise with its governing body as to the desirability of constructing a market and the employment of leasing agents to secure tenants therefor (R. 885). The Committee recommended that the City proceed with the market and negotiate with Fean and DeOreo for their employment as leasing agents (Pl. Ex. 62-B, R. 2536; offered, R. 474).

Thereupon the City began negotiations with Fean and DeOreo, which resulted in the execution of a contract dated June 16, 1938 (Pl. Ex. 62-B, R. 2543-9; offered, R. 474) for their employment on the basis of commissions on rentals received as a result of their previous efforts for one and a half years and over the ten year period of the contract, contingent upon obtaining leases, subject to the approval of the City, for 80% of the facilities to be constructed. It was estimated Fean and DeOreo would collect commissions of $179,500 from the City under their leasing contract, and the Mayor so advised the Public Works Administration (R. 1038; Pl. Ex. 6, R. 1623; offered, R. 418). The contract provided that "The City reserves to itself the right to approve leases and to fix the terms and conditions of each and every lease, and no lease shall be binding or effective until same is approved by the governing body, and attested by the City Clerk, as provided by law" (R. 2547).

During this same period, the City employed architects

([R. 2578-83] one of whom had furnished Stanley with preliminary plans), perfected plans for the market, and on June 9, 1938, filed with the Public Works Administration application known as Public Works Administration Docket 1356-F for a grant from the Public Works Administration to the extent of 45% of the cost of the food market project, pursuant to Resolution 10891 (Pl. Ex. 62-B, R. 2542-3; offered, R. 474).

On June 17, 1938, the committee of wholesale produce merchants organized by DeOreo advised the Mayor that they had secured leases on form prepared by the City Attorney for 51 units, assured the Mayor that other merchants would sign leases, and urged the City to build the market (R. 899; Pl. Ex. 5, R. 1596-8; offered, R. 417).

Opposition to Market and Investigation by Public Works Administration.

From the moment it was known the City intended to file the application, a well organized opposition developed and continued throughout (R. 781).

Property owners claiming loss in property values in the vicinity of the old City Market in Kansas City, Missouri, the City Manager of Kansas City, Missouri, competing railroads, and cold storage interests in the latter city carried on a campaign to defeat the project (Pl. Ex. 6, R. 1616-18; offered, R. 418).

The Public Works Administration sent Investigator Bevington to Kansas City. At his request, he was furnished reports from the officials of the City, the Governor of Kansas, the Chamber of Commerce, the Kansas State Chamber of Commerce, the Kansas State Planning Board, the City Planners and Consulting Engineers, the

President of the First State Bank, the Secretary of the Kansas State Board of Agriculture, the Department of Economics of the State College of Agriculture and Applied Science, the officers of the Wyandotte County Farm Bureau, Willard J. Breidenthal, Cashier, Riverview State Bank, City Attorney Skinner, the Director of the Governmental Bureau of Research, and other data material to the application (R. 781-3). At Beyington's request, Stanley made a detailed written report of the interest and activities of Union Pacific in connection with the market (Pl. Ex. 6, R. 1610-21; offered, R. 418). Stanley took cognizance of rumors circulated by Gratz of the North Side Business and Improvement Association of Kansas City, Missouri, and other opponents of the market that "the Union Pacific is buying the merchants, buying the market, and doing other absurd things" and stated "The Union Pacific has not and will not take over any leases in connection with proposed enterprise, the Union Pacific has not and will not purchase any bonds offered by the City, the Union Pacific has not and will not purchase the property of any wholesale produce merchant in Kansas City, Missouri" (R. 1619). He pointed out in his letter the arrangements made between the City and Fean and DeOreo and their activities subsequent thereto (R. 1613); the subsequent agreement of the Union Pacific to lease part of the Public Levee lands and build trackage to serve the market. He discussed the cold storage interests and the monopoly in that business enjoyed by U. S. Cold Storage Company in the territory; the fact that the cold storage plant should also include an ice manufacturing plant; and that Union Pacific and its affiliate, the Pacific Fruit Express Company, would buy their ice requirements at fair prices from the lessee of the plant, the current prevailing price being $3.50 per ton (R. 1617-18). He

stated that officials of Union Pacific had interviewed investment bankers and made it entirely plain that Union Pacific would lease land on the Public Levee upon which to build trackage to serve the market (R. 1620).

Appellees' witness Bevington testified at the trial that he reported that Sheehan of defendant Garrett-Holmes Company (a produce firm) had stated in writing "that representations were made to him that in the event of his taking space in the Kansas City, Kansas, market, the Union Pacific would, on a valuation of $20,000 as to the present worth of his present lease and improvements thereon, give him a rent credit in said sum on a thirty year lease" (R. 1175). The witness did not produce the purported written statement. Sheehan's attention being called to this statement of Bevington he testified that no one ever represented to him that if his firm would move over and take quarters in the food terminal Union Pacific would make an adjustment of any kind with his company, and that no one ever stated that Union Pacific would either give or cause to be given credit on his lease of $20,000 if he would take a thirty-year lease. He made no such statement to Bevington and did not give him any written statement (R. 1197).

Bevington's report was submitted to his superior officers September 12, 1938, with his recommendations (R. 1167; 1175). He had no authority to determine whether the grant should or should not be made, but was merely delegated to develop facts (R. 1167). His "Recommendation" shown in Plaintiffs' Exhibit 255 (R. 3202; offered, R. 1169) was that "consideration be given to the substantial evidence that the project as proposed is economically unsound, and to the findings of Economist Crow that the proposed market is excessive in size as compared to the real needs of the community, and that greater

Kansas City will not support two produce markets, and that a split market will bankrupt one or both of such markets."

Thereafter Secretary Ickes made the public grant (R. 1175).

Turney Gratz, representing the North Side Business and Improvement Association of Kansas City, Missouri, conducted an active campaign against the new market (Pl. Ex. 6, R. 1615-6; offered, R. 418). He represented that in cooperation with Dodds of U. S. Cold Storage he had obtained a dictograph record of alleged statements by defendant Ulmann, an attorney representing Fean, to defeat the grant (Pl. Ex. 8, R. 1672; offered, R. 418). He sent a telegram to the President of the United States, which was reported in The Kansas City Star on November 29, 1938. As a result of that publicity, Mayor McCombs telegraphed Secretary Ickes, deploring the misrepresentations made to the President of the United States by Gratz. In response, the Assistant Administrator replied: "Notwithstanding newspaper reports, we have not changed and do not expect to change our position regarding your project" (Pl. Ex. 8, R. 1673; offered, R. 418).

Time Spent by City Officers in Washington in Negotiations for the Grant and Assistance Given Them.

Much time was spent in Washington by City officers and Breidenthal and Stanley, while the City's application for the grant was pending, and in connection therewith the City received assistance from State and Federal officers, Senators and Representatives in Congress, members of the President's Cabinet, and many organizations in the State of Kansas who were interested in the construction of the market (R. 780; 889).

Cancellation of Leasing Agents' Contract.

The Public Works Administration indicated that it ould not approve the grant unless the contract with ean and DeOreo was cancelled (R. 770, 886).

Upon receipt of this advice, Fean and DeOreo, with their torney, were summoned to Washington, and in confer- ce with the City officials and Breidenthal and Stanley, ere informed that the grant would not be made unless eir contract was cancelled, in which event the market ould not be constructed. On advice of their attorney ean and DeOreo consented to the cancellation of the ntract upon Breidenthal's assurance that the Cham- r of Commerce would endeavor, by private subscription, reimburse them for expenses incurred during their ef- rts in developing the project (R. 662, 770-3). Subse- uent negotiations with the Chamber of Commerce failed result in an agreement (R. 581, 626-7, 645).

Grant from the Public Works Administration.

Upon report of the cancellation of the Fean and DeOreo ntract being made to the Public Works Administration grant was approved October 24, 1938, and accepted by e City November 4, 1938, for 45% of the cost of the roject, not to exceed $1,710,000 (R. 891; Pl. Ex. 62-B, . 2576-8; offered, R. 474). The grant was conditioned:

(a) That the facilities of the project be made available to all railroads entering Kansas City, Kansas, upon fair and reasonable terms and without discrimination;

(b) That all contracts for service of the project by the railroads, including switching, joint use of track-

age and other facilities, be satisfactory to the Administrator;

(c) That all fees to be paid to real estate agents, directly or indirectly, be eliminated;

(d) That the contract between the City and Fean and DeOreo be cancelled, that all contracts of like tenor be abrogated, and that no further contracts of such or similar tenor be made;

(e) That within not to exceed 15 days from the date of the offer (October 24, 1938) the applicant will deposit in the Construction Account described in the terms and conditions its entire share of the estimated cost of the project upon completion, as determined by the Administrator, and in any event, not less than $2,090,000 (R. 2577).

Purchase of Bonds by the Union Pacific.

Following approval of the grant Stifel, Nicolaus refused to purchase the bonds (R. 892). Appellee's witness Thoron had taken the position with Stifel that "they had unjustifiably withdrawn their commitment on the market" and that Stifel made several conflicting statements as to why they had not bought the bonds (R. 1193).

The City asked Breidenthal to contact bond buyers, but was advised that because of the time limitation in the grant within which to get the City's funds in the Construction Account, there was not sufficient time for investigation by other bankers (R. 892). The City then inquired if Union Pacific would buy the bonds (R. 892). On November 2, 1938, Haugh wrote the Public Works Administration, quoting a statement in Stanley's letter to Bevington (*supra* p. 42) that Union Pacific would not buy any bonds but advising that in view of Stifel, Nicolaus' withdrawal, Union Pacific was now proposing to purchase the bonds to expedite matters and keep within

the time limit prescribed by the Administrator, and requesting advice to the City of any objections to the purchase (U. P. Ex. 233, R. 3057; offered, R. 1127). Haugh and the Mayor consulted officials of the Public Works Administration, who, after consideration for two weeks, advised they saw no reason why the bonds could not be sold to Union Pacific (R. 892; Pl. Ex. 7, R. 1669; offered, R. 418). The Interstate Commerce Commission was also advised that Union Pacific intended to buy the bonds providing it was the highest bidder (R. 1109-10).

The purchase of the bonds was recommended to the Executive Committee of Union Pacific, accompanied by an estimate of annual gross rentals from the Levee property after allowance for vacancies, of $294,532 as against the average annual interest and amortization requirements on the revenue bonds of $175,106 (Pl. Ex. 28, R. 2201; offered, R. 419). Haugh stated that for a year and a half he had studied the matter, made a lot of figures and gotten a lot of advice, and was of the decided opinion, which he stated to the Executive Committee, that the bonds were a sound investment that would pay out, both interest and amortization, during the period of the bonds (R. 1106). Before its purchase, Union Pacific was advised by its own counsel (Pl. Ex. 7, R. 1665-6; offered, R. 418) that the authority and discretion of the governing body of the City with respect to rates of rental and expenses of operation could not be controlled by judicial proceedings at the instance of the holder of the bonds.

Union Pacific made a formal proposal to the City to purchase the bonds, conditioned as follows, which was accepted by the City (Pl. Ex. 62-B, R. 2600-5; offered, R. 474):

(1) That the bonds shall be validly authorized and that the outstanding revenue bonds be canceled;

(2) That the grant from the Public Works Administration be secured;

(3) That approval of counsel as to the legality of the bonds be furnished;

(4) That the City secure a release of the contract with Stifel, Nicolaus & Company, covering the purchase of the bonds;

(5) That the City enter into a lease with the Union Pacific covering a site for perishable team track yard and obtain approval thereof by the Federal Emergency Administration of Public Works as a compliance with conditions (a) and (b) of the grant;

(6) That in the event the offer be accepted, Union Pacific to have the right, at its opinion, to designate an engineer to cooperate with the City in matters relating to the construction of the improvements.

The offer was supplemented by agreement of Union Pacific to resell the bonds to the City or its nominee at its request within one year after the purchase at the face value thereof plus accrued interest (Pl. Ex. 45, R. 2330; offered, R. 424).

The bonds were issued as authorized by Ordinance No. 30206 (Pl. Ex. 62-B, R. 2557-76; offered, R. 474) as amended by Ordinance No. 30239 (Pl. Ex. 62-B, R. 2591-9; offered, R. 474) and the purchase was consummated by Union Pacific paying to the City the principal amount with accrued interest (Pl. Ex. 45; R. 2339; offered, R. 424).

Court Action to Determine Validity of Bonds.

The City Commissioners required an adjudication by the Supreme Court of Kansas whether the bonds were lawfully issued pursuant to the Kansas Statutes and

Ordinances Nos. 30206 and 30239 and whether the bonds, if issued, could become a general obligation of the City (R. 787, 963). In *State of Kansas ex rel. Beck, Attorney General,* v. *The City of Kansas City, Kansas,* 149 Kan. 252, 80 Pac. (2d) 476, the Supreme Court of Kansas held that the bonds in question were issued in strict accordance with the statutes, the statutes were constitutional, the ordinances were valid, and the bonds could not become a general obligation of the City, but would be payable solely from the revenues of the Public Levee.

Contract for Trackage Serving the Market.

During the pendency of the application filed with the Public Works Administration, negotiations were being conducted by the City with the Union Pacific with respect to trackage to serve the market (R. 780, 791, 897).

"There was never any discussion between the City officials, the witness (Skinner) and officials of the Union Pacific Railroad Company about diverting traffic to the Union Pacific Railroad" (R. 795). The Mayor testified to the same effect (R. 895).

On June 27, 1938, appellees' witness Thoron attended a conference in the office of the Assistant Administrator of the Public Works Administration, where a large delegation was present, headed by the Secretary of War, in support of the project. C. R. Gray, former President of the Union Pacific, was present, and the witness requested the General Counsel of the Public Works Administration to see what interest the Union Pacific had (R. 1190). Mr. Gray called attention to the protest of the Missouri Pacific filed with Assistant Secretary of the Interior that a monopoly was being created for Union

Pacific and stated that Union Pacific would agree to switch, with expedition and without discrimination, cars of all railroads (Pl. Ex. 5, R. 1599-1600; offered, R. 417).

Haugh, accompanied by the Mayor, Breidenthal, and the City Attorney, called on Thoron, who asked if the General Counsel was satisfied with the arrangement with the railroad, and was told that the latter wanted to see the contract, but the outline of the agreement appeared to be satisfactory (R. 1191; Pl. Ex. 6, R. 1608; offered, R. 418).

A letter to Don C. McCombs, Mayor, signed by Haugh, was left with the Administrator, describing the interest of Union Pacific in the development of the market by the City, not only from a local standpoint but from that of a large national market; that it was prepared to build a team track yard and necessary lead and yard tracks; and that the team track yard would be open to all railroads under tariffs similar to those charged for like service in other national perishable markets (Pl. Ex. 6, R. 1606-7; offered, R. 418).

The lease, covering 24.7 acres of the Levee at a rental of $10,760 per annum, for a minimum term of 30 years obligating Union Pacific to construct and operate a team track yard with a capacity of 300 cars and to operate the city owned house tracks serving the produce buildings (Pl. Ex. 26, R. 2165-73; offered, R. 419), was concluded in strict compliance with the requirements of the General Counsel of the Public Works Administration (R. 792) and was approved by him in a letter to the City Attorney, dated December 10, 1938 (R. 793; K. C. K. Ex. 184, R. 2964; offered, R. 792). The General Counsel in particular insisted upon the provision set out in Section 9 of said lease (R. 792) that

the "perishable team track yard shall be open to cars of all railroads entering Greater Kansas City and in furtherance of this purpose the Union Pacific agrees that, during the term hereof, it will switch with expedition and without discrimination at rates provided in lawfully published tariffs, all cars destined to or originating on trackage * * * serving the Food Terminal regardless of the railroad over which such cars arrive within or are destined to depart from the switching district of greater Kansas City. In the event that the Union Pacific defaults in the observance and performance of its obligations under this Section 9 and such default shall continue for a period of thirty (30) days after receipt by the Union Pacific of written notice from the City specifying the default, then the City may terminate this agreement by giving to the Union Pacific sixty (60) days written notice of its intention so to do" (Pl. Ex. 26, R. 2171; offered, R. 419).

In November, 1938, representatives of the City and Union Pacific, in response to request on Union Pacific for information, called upon the Interstate Commerce Commission and advised that Union Pacific proposed to lease land from the City for the team track yard at a rental of $10,760 per year and to expend about $500,000 in constructing the yard and tracks to serve the facility (R. 1109-10).

Tariff Provisions to Comply With Condition of Grant that Market Would be Open to the Cars of all Railroads Serving the Kansas City Area.

A tentative form of tariff was submitted by Union Pacific to W. B. Hardie, Director of Traffic, Interstate Commerce Commission, dealing with switching charges proposed for the team track yard (R. 1107; U. P. Ex.

234, R. 3058; offered, R. 1127) copies of which together with the letter of transmittal, were taken to the General Counsel of the Public Works Administration (R. 1108). Hardie wrote the Public Works Administration that the proposed tariff had been examined and was acceptable under the Commission's rules concerning the filing of tariffs, and if tendered for filing upon statutory notice of thirty days, it would be passed to the Commission's files (R. 1108; U. P. Ex. 235, R. 3062; offered, R. 1127).

Union Pacific thereafter filed with the Commission Union Pacific Tariff 105-J, specifying switching rates of $13.20 for cars switched to and unloaded at the Kansas City, Kansas, market, and for cars switched to the market and then diverted, $6.60 in and $6.60 out (U. P. Ex. 236, R. 3063; offered, R. 1127). All other railroads serving the Kansas City area, including appellee railroads, filed concurring tariffs providing for the absorption of switching charges specified in Union Pacific Tariff 105-J which are shown in U. P. Exhibits 237 to 247, both inclusive (R. 3072-3115; offered, R. 1127). Witness for plaintiffs below testified that when the Santa Fe ships a car to the Kansas City, Missouri, market for unloading on Kansas City Southern tracks (the customary place of unloading for that market [R. 1097]) the Santa Fe absorbs a switching charge of $13.20 and that "until very recently if that car was switched to the Kansas City Southern team track and then diverted, there was a further charge of $13.20" (R. 702).

Appellees' Estimates With Respect to Effect on Traffic Account Construction of the Market.

The traffic witness for the Santa Fe estimated its loss of perishable traffic from the West, if all the receivers in Kansas City were located on the new market, in excess of $600,000 (R. 701).

The traffic witness for appellee Burlington estimated the ultimate loss to that company as between $60,000 and $70,000 per year (R. 705).

Rock Island traffic witness estimated a loss of 2,000 cars per year for the Rock Island, including traffic originating on the Union Pacific in Idaho, which the Rock Island solicits for diversion from Union Pacific at Denver (R. 708-9).

Missouri Pacific traffic witness testified to a prospective loss to the Missouri Pacific of 50% of its traffic competitive with the Union Pacific (R. 694).

Each of these traffic witnesses who was examined on the subject asserted that the line on which a shipper was located had a substantial advantage in the solicitation of his traffic (R. 692-3, 699, 708).

These estimates, adopted by the trial court as supporting its finding of fact No. 36 (R. 361), should be contrasted with the undisputed evidence that the Kansas market was open to all railroads in accordance with requirements of the P. W. A. grant. Of the 1018 cars arriving at Kansas City via the Union Pacific and set to the food market tracks for inspection and diversion during January, February, March and April, 1940, while the market was in actual operation, all but 77 were diverted to roads other than the Union Pacific, including a large percentage to the appellee railroads (U. P. Ex. 379, R. 3875; offered, R. 1401). Of the 981 cars un-

loaded at the market during the same period, 723 cars were brought to Kansas City in road haul movement by railroads other than Union Pacific, 573 by the appellee railroads, and only 258 by Union Pacific (U. P. Ex. 380, R. 3876; offered, R. 1401).

Construction of the Market.

After the grant was made, architects employed by the City completed plans for the market. The City with the cooperation and approval of engineers of the Public Works Administration let contracts for construction of the market (R. 789, 895, 964-5). From time to time an architect of Union Pacific met with the City officials and architects and engineers of the Public Works Administration and made suggestions for reducing the cost of construction, some of which were followed and others rejected (Pl. Ex. 283, R. 3447-53; offered, R. 1248).

The construction funds of the City deposited in banks in compliance with the agreement prescribed by the Public Works Administration were paid out only upon approval of the Public Works Administration (R. 791; K. C. K. Ex. 180, R. 2949; offered, R. 791; K. C. K. Ex. 181, R. 2959; offered, R. 791).

During the entire year of construction, a great amount of the time of the City officers, with certain days set aside for no other business, was devoted to the market. The City Commissioners were in almost continual session (R. 790, 895-6, 965), at which representatives of the Public Works Administration were in attendance at practically all of the meetings. No part of the plans, changes in plans, or construction of the market was made without the latter's approval (R. 896).

Official Action by City Controlling Levee Improvements.

The extensive and independent activities in which the governing body of the City and its officers engaged throughout the whole period of the City's efforts to develop the Public Levee, are shown by K. C. K. Exhibits 114 to 202, inclusive (abstracted, R. 2892-2907), including copies of formal ordinances and resolutions, regularly enacted and published between August, 1933, and January, 1940, in addition to the offical action of the City Commissioners shown in Plaintiffs' Exhibits 62-A (R. 2481; offered, R. 474), 62-B (R. 2526; offered, R. 474), and 62-C (R. 2680; offered, R. 474).

K. C. K. Exhibit 191 (R. 2968-94; offered, R. 801) is a summary of some 298 formal resolutions adopted by the City Commissioners over the same period in relation to the Levee improvements.

Condition of the Public Levee Before and After It Was Improved.

The condition of the Public Levee and its use as a public dump, which prompted the City's efforts in its development, are shown on U. P. Exhibit 274 (R. 3356; offered, R. 1306). The result of these efforts and present condition of the Public Levee are demonstrated on U. P. Exhibit 232 (R. 3055; offered, R. 1127), showing the river-rail elevator, conveyor gallery and dock, the Minnesota Avenue viaduct, the Jersey Creek enclosure, the farmers' market with restaurant, rest rooms and truck scale, the four produce buildings A, B, C and D, the cold storage and ice plant, the joint Union Pacific-Missouri Pacific track serving the dock and cold storage plant, the team track yard and the wide paved areas throughout the market. The City's market improvements,

in detail, are shown in Plaintiff's Exhibit 278 (R. 3424-35; offered, R. 1236). The location and convenience of access of the market facilities are set forth in Plaintiffs' Exhibit 271 (R. 3264; offered, R. 1203) as follows:

> "The southerly portion of the terminal is only the equivalent of five blocks removed from the peak of values in the retail district of Kansas City, Kansas, and is only about five minutes ride by automobile from the heart of the retail district of Kansas City, Missouri. The Terminal is at or near the edge of the corporate limits of both cities and yet is in an area free from traffic congestion. It is so situated in relation to trafficways, streets, and highways, that any part of the Greater Kansas City area can be reached with a minimum of time and travel. By using Minnesota Avenue and Minnesota Avenue Extension, access is had to Quindaro Boulevard and the Seventh Street traffic-way, which connect with every important through highway in the entire Greater Kansas City area. It is thus possible to reach the Terminal without having to use the congested highways of either city."

A detailed description of the market improvements is set forth in Plaintiff's Exhibit 277 (R. 3404-7; offered, R. 1236).

Source of Funds for Construction of the Market.

The market was financed by a grant from the Public Works Administration of 45% of the cost of improvements, not to exceed $1,710,000, by proceeds of the sale of $3,000,000 of Public Levee Revenue Bonds ($1,033,000 of which was used to retire outstanding revenue bonds) and by proceeds of the sale of not less than $123,000 of general obligation bonds of the City (amount spent being

$149,000). In the total Public Levee improvement, the City expended from its own funds, derived from the issuance of general obligation bonds or from taxation, $746,633.62 (R. 788; K. C. K. Ex. 141, R. 2907-10; offered, R. 940).

Advances Made by Union Pacific for Preliminary Expenses of the Market Project.

As in the case of preliminary expenses on the elevator project, Union Pacific or its subsidiary, The Kansas City Industrial Land Company, advanced funds to cover preliminary expenses of the City on the market, because the City had no funds available therefor, on the agreement that the City would repay same out of the Construction Fund. Repayment was not made because of the change in regulations of the Public Works Administration in November, 1938. However, the City has agreed to pay the expense out of its revenue funds when verified bills are rendered (R. 882-3, 894-5, 961-2, 1026-7; Pl. Ex. 31, R. 2233; offered, R. 421; Pl. Ex. 32, R. 2253; offered, R. 421; Pl. Ex. 37, R. 2272; offered, R. 422).

In March, 1938, while negotiations between the City and Fean and DeOreo for the leasing agency contract were pending, Union Pacific advanced to Fean and DeOreo $2,000 to bear the expenses of a trip to eastern markets, with the understanding that it would be repaid in the event the market was financed by the City (R. 582) and leased to Fean and DeOreo as exclusive agents, but if not so financed or built, would not be repaid (Pl. Ex. 31, R. 2243; offered, R. 421). Receipt was taken in the name of Breidenthal in order to establish the transaction to the satisfaction of the City officials and lay a proper foundation for a claim (Pl. Ex. 13, R. 1844; offered, R. 418).

Union Pacific loaned Fean and DeOreo $300 each on four different occasions, to be repaid in case the project was completed. Similar receipts for these payments are shown in Plaintiff's Exhibit 31 (R. 2240-3; offered, R. 421).

Each of these payments and receipts was shown and currently recorded in the accounts of Union Pacific, subject to examination and produced in evidence by Examiners of the Interstate Commerce Commission (Pl. Ex. 31, *supra*).

After Union Pacific had purchased the revenue bonds, and after the agreement of June 16, 1938, between the City and Fean and DeOreo had been canceled, the latters' financial resources were exhausted because they had received no payment either on account of commissions or expenses and were unable to borrow on the leasing contract with the City as provided therein (Pl. Ex. 62-B, R. 2549; offered, R. 474). They requested a loan from Union Pacific, which, because of its expenditure in the building of the team track yard, the investment in the bonds, and the interest of its subsidiary, The Kansas City Industrial Land Company, in the adjoining industrial district, agreed that the Land Company would advance to each Fean and DeOreo $350 monthly to cover their expenses and keep them on the job, with the understanding that the amounts would be repaid when Fean and DeOreo received compensation for the work they had done. Commencing in December, 1938, and continuing until the time of the trial of the case, the Land Company issued vouchers to Fean and DeOreo in the sum of $350 per month each, which indicated on their face that they were for services rendered to avoid carrying the amounts in Suspense (R. 1046-7, 1105; Pl. Ex. 22, R. 2115; offered, R. 419).

The Land Company advanced expenses incurred by Fean in connection with the development of the farmers' market because of the City's inability to pay therefor, on an understanding had by Stanley with City officers that the amount so advanced would be repaid by the City to the Land Company out of income from the market when it was completed (Pl. Ex. 21, R. 2099; offered, R. 419).

Leasing of Cold Storage Plant.

Because of its contact with ice manufacturers and cold storage men at different places, the City requested Union Pacific to secure information and suggest a lessee for the cold storage plant (R. 798, 914-5, 1111). Five or six cold storage companies were interviewed (R. 1111). Each was advised that Union Pacific and Pacific Fruit Express Company would buy their ice requirements of approximately 30,000 tons a year, at competitive prices, from the lessee of the cold storage plant, the current prevailing price being $3.50 per ton (Pl. Ex. 6, R. 1618; offered, R. 418).

Dodds, who operated the U. S. Cold Storage Company in Kansas City, Missouri, and had taken an active part in opposing the Kansas City, Kansas, market, was unfavorable to construction of a cold storage plant because of undesired competition (R. 1111; Pl. Ex. 6, R. 1617-18; offered, R. 418).

Appellees' witness Hardgrave talked to Stanley and Haugh in behalf of the U. S. Cold Storage Company. He stated that the cold storage plant would be a losing proposition and that the ice contract would have to be "sweetened" and was advised that there would be

no "sweetening" (R. 538; 1112). Hardgrave said that a price of $3.60 or $4.00 per ton would be required and that no money could be made furnishing ice at $3.00 per ton (R. 542).

Of the ice and cold storage people interviewed, City Ice & Fuel Company evinced interest. Negotiations continued over four or five months between representatives of the City, Union Pacific, Pacific Fruit Express Company, and City Ice & Fuel Company (R. 965-6) which finally resulted in the consummation of a lease between the latter and the City for the cold storage plant (R. 965-6; Pl. Ex. 62-B, R. 2632-41; 2646-49; offered, R. 474) at an average rental of $38,497 per annum (Pl. Ex. 286, R. 3464; offered, R. 1269) and obligated the lessee to maintain the equipment at an approximate cost of $12,000 per annum (R. 1410).

As a result of a proposal submitted by City Ice & Fuel Company on December 19, 1938, Union Pacific, Pacific Fruit Express, and City Ice & Fuel Company negotiated a contract for the sale of ice to the Union Pacific and Pacific Fruit Express at Kansas City on a sliding scale of prices, which, based on the ice consumption of the purchasers during the year 1939, amounted to an average price of $3.18 per ton (Pl. Ex. 40, R. 2298; offered, R. 423) as compared with the price of $3.50 per ton then being paid by them under their old contract (Pl. Ex. 17, R. 2054; offered, R. 419).

Adoption of New Lease Form and Securing Execution Thereof.

After the cancellation of the contract between the City and Fean and DeOreo, the City on December 6, 1938, adopted a revised form of lease (R. 797; Pl. Ex. 62-B, R. 2616; offered, R. 474).

The new printed form designating the City of Kansas City, Kansas, as Lessor covered space in the City's warehouse buildings at a rental of $50 per month per unit for the first three months, commencing thirty days after notice from the City of completion of the facilities, and of $150 per month per unit thereafter. A supply of the printed forms was furnished to Stanley, who was asked by the Mayor to assist the City in procuring execution of leases to be presented to the City Commissioners for their consideration (R. 797; 899). The published Ordinance No. 30304, adopting the revised form of lease, provides:

> "That any person desiring to lease any of said wholesale units in said Kansas City Food Terminal shall sign and present his application in the form of said Founder's Lease hereinbefore prescribed, filling in the appropriate blanks and designating the particular units desired on the plat attached to said Founder's Lease, and present the same to the Board of Commissioners of said City by filing said Founder's Lease application in the office of the City Clerk, together with information concerning such applicant as will show his business experience and other matters which may be deemed necessary for the Board of Commissioners to determine his reliability as a tenant. When said application has been approved by the Board of City Commissioners by appropriate recorded action of said Board, the Mayor and City Clerk may be authorized to execute in the name of

the City, a lease in the form and terms as hereinbefore and in Section 1 hereof set out." (Pl. Ex. 62-B, R. 2624; offered, R. 474.)

DeOreo attempted to secure execution from anybody that he thought was eligible to do business as a wholesale dealer, and asked everyone who had signed the previous mimeographed form to execute the new form (DeOreo, R. 623).

The first signed leases for the market facilities were delivered by Stanley to the City Hall about July 1, 1939 (R. 899) and were officially acted upon and their execution by the City authorized on July 3 (R. 797).

A total of 38 leases covering 46 dealers' units, 45 units in Buildings A, B and D, and one unit in Building C, were executed both by the Lessor and Lessee (Pl. Ex. 104, R. 2837; offered, R. 682). Other leases, some of which were signed in blank by the Lessee or in which the Lessee had inserted a stipulation that the lease might be canceled before moving in or that the Lessee might change his mind, were tendered to the City but were not executed by it (Pf. Ex. 104, *supra;* R. 2847-8).

Some prospective lessees insisted upon reimbursement from the City for lease obligations and equipment as a condition of executing their leases.

A lease signed by H. Widlansky under date of August 28, 1939, contained the following condition: "This lease is made on the distinct understanding that lessor will assume lessee's present lease at 213-215 Walnut Street and take over lessee's present equipment in said premises on a cash basis satisfactory to lessee; otherwise this lease is null and void."

Lease signed by Joseph L. Robinson, doing business as "National Produce Company" under date of August

17, 1939, provided: "This lease is conditioned on lessor paying lessee the sum of one thousand three hundred and fifty (1,350) dollars in cash to hold lessee harmless from loss on account of moving equipment and existing lease." A similar provision was contained in the lease signed by H. Junsberg & Son, dated September 29, 1939.

Lease signed by Winnick Brothers, August 18, 1939, was conditioned: "This lease is made on the distinct understanding that my present lease at 309 Walnut Street, Kansas City, Missouri, and special equipment be settled for in cash in manner and amount satisfactory to me; otherwise this lease is null and void."

A similar provision was contained in a lease signed by Litman Produce Co., dated August 17, 1939 (Pl. Ex. 104, R. 2842-45; offered, R. 682).

DeOreo, as witness for appellees, testified that he first learned of demands of prospective tenants for reimbursement on account of existing lease obligations and loss of equipment in the fall of 1939 (R. 632); that he negotiated the leases with Widlansky, Winnick, Robinson and Junsberg; that the conditions recited in those leases were propositions of the lessees and not of DeOreo that the conditions were typed in the leases by a stenographer in Stanley's office; that after they were signed, he left the leases in Stanley's office to be taken to the City Hall as propositions from the proposed lessees (R. 1177-80); that he told Litman there was nothing he could do about the proposition except to take it up with the City; that the City was the only one that could solve the situation (R. 633); that he told Winnick Brothers to give him their proposition and he would submit it; that he reported the proposals to Stanley and to the Mayor and City Attorney (R. 633); that the next he learned of the proposals was

when he heard the City had appointed a committee which was calling on prospective tenants (R. 632-3).

On advice from DeOreo of the demands of tenants, Stanley stated that the Union Pacific could not do anything about it, but he would report the matter to the City. He reported to the City Attorney and to the City Commissioners and advised that Union Pacific could not make any adjustment with tenants and if any were made they would have to be made by the City (R. 1048).

Investigation of Claims of Prospective Tenants by Committee of City Officers.

The City appointed a committee of City officers, consisting of the City Attorney, City Clerk, and the City Engineer, to investigate claims and demands (R. 801-2, 902, 967; K. C. K. Ex. 192, R. 2994; offered, R. 802). The committee met and interviewed certain of the claimants, who were advised that the committee had no authority to make any settlement, but were merely ascertaining facts and the basis of the claims, and no offers were made (R. 802-9). Rouse, a representative of the Union Pacific, sat with the committee, but not as a member thereof (R. 684, 802). Appellees' witness Payne stated the produce dealers interviewed "were plainly told by both Mr. Skinner and Mr. Rouse that neither the City nor the Union Pacific had any money to pay them with, and that cash settlements were out of order. * * * We weren't empowered to make any offers to them and told them that" (R. 680). A report of the committee's investigations was submitted to the City Commissioners (R. 809; Pl. Ex. 105, R. 2851; offered, R. 683).

Further Investigation of Claims of Prospective Tenants by Outside Committee.

Following the report of the committee of City officers, another committee, consisting of Graham Cooksey and Dudley Brown, brokers on the market who knew the produce dealers and were familiar with their business, and Stanley of the Union Pacific, was appointed by the City further to develop facts respecting claims of prospective tenants (R. 810, 902, 967). This committee made a report of its investigations (R. 902; Pl. Ex. 27, R. 2173; offered, R. 419).

Legal Committee Appointed by City to Determine Its Authority to Make Settlements With Prospective Tenants.

The City then appointed a Legal Committee, consisting of William Drennan, Blake Williamson, and Edward McAnany of the Kansas City, Kansas, Bar to assist the City Attorney in advising City Commissioners whether the City could lawfully negotiate settlements of such claims with prospective tenants (R. 812, 902, 968).

After deliberation for a number of days (R. 812) this committee rendered an opinion stating that the statutes of Kansas and cases had been examined; that "in the matter of making contracts for the leasing of the facilities of the Food Terminal, the governing body of the City is vested with power and authority, in exercise of their discretion and judgment, to lease the individual units and facilities upon such terms and conditions as will be to the best interest of the City and that any adjustments made to fit the peculiarities incident to any individual lease, may be adjusted by the use of cash

or credit on rental;" that cash used must come from the Public Levee Revenue Fund; that the City has authority to accept and give credit for any rent offered in advance; that such authority of the City is subject to the mandatory provisions of the statutes as to fixing of minimum rates to be charged so as to meet the statutory requirements with respect to payment of expenses of the City and the payment of the principal and interest on the bonds (K. C. K. Ex. 194, R. 2999; offered, R. 813).

Counsel for Union Pacific met with the Committee, discussed the legal question and furnished citations (R. 856).

Information Developed by City as to Its Financial Ability to Make Settlement of the Claims.

The ability of the City to meet its bond and interest requirements and pay the expenses of operation, including the adjustments under consideration, was carefully investigated. The revenues and expenses of the Public Levee facilities, including income from existing long term leases and from the rental of the market facilities, based on the schedule of rentals theretofore adopted by the City, the bond and interest requirements, and the expenses of operation, including the adjustments, were calculated by Certified Public Accountants and showed that the revenues of the Levee, including advance rental payments on existing long term leases, would be sufficient to enable the City to meet its bond and interest requirements and the expenses of operation, including the adjustments, and to provide a surplus during the first year of operation and an increased surplus during each of the next two years (Pl. Ex. 284, R. 3454; offered, R. 1248).

This estimate was supplemented by one prepared by

Auditor McIntyre at the request of Finance Commissioner Darby, showing that the revenues would be sufficient to meet the bond and interest requirements of the City and all expenses of operation and maintenance, including cash adjustments, with an advance rental payment of $80,000, and to provide a surplus at the end of the first year of operation of $58,681.61, the second year $86,402.28, and the third year $133,644.83, after giving effect to the payment of the proposed adjustments (R. 944; K. C. K. Ex. 228, R. 3044; offered, R. 947). This estimate was prepared in December, but was put in mimeographed form in January, 1940, after the advance rental payment of $80,000 had been made (R. 952).

The estimates upon which the City acted in adopting Resolution 11275, covering the contemplated adjustments, were supplemented at the trial by a more detailed and complete estimate by the City Auditor of results of operation over the 30-year period within which the revenue bonds would mature (K. C. K. Ex. 229, R. 3047; offered, R. 949).

The receipts were calculated on the basis of rentals provided in existing long term leases (R. 947) and on the produce units on the basis of rentals provided in the form of lease adopted by the City which averaged $125 per month for the first 12 months and $150 thereafter. The per centage of occupancy of the produce units was based upon estimates of the City Commissioners, from investigation of other markets (R. 970), and allowance was made for 10% vacancy and loss of rentals and refrigeration charges (R. 947).

After taking into account the use of advance rental payments in settlement of the maximum cash adjustments in contemplation and other expenses of operation and maintenance to be borne by the City, an accumulated

cash surplus of $2,823,728.12 was estimated at the end of the 30-year period after the payment of interest semi-annually upon and the retirement at maturity of the revenue bonds, such principal and interest amounting to $5,195,269.65. In the preparation of the estimate, current charges for depreciation were not made because the surplus was more than enough to absorb the same. "We are going to pay interest on $3,000,000 worth of bonds. We have got approximately $7,000,000 of assets on the project. We can write off considerable there and still have something left" (R. 955-6). No effect was given to the saving on interest which could be accomplished by the optional retirement of bonds before maturity (R. 949). The calculations show that all of the bonds could be retired in 15 years, but to be conservative on the matter, the City calculated that in 20 to 22 years the debt could be fully paid (R. 950).

Appointment of Committee to Advise With the City as to the Business Advisability of Settling the Claims of Prospective Tenants.

The City then appointed a committee of citizens, consisting of bankers, merchants, and other businessmen, to advise with the City Commissioners as to the business advisability of making the adjustments under consideration (R. 812; 903; 968). This committee met with the City Commissioners on a number of occasions. At one meeting Haugh, at the invitation of Mayor McCombs, read to the meeting a statement relating to the proposed adjustments (R. 1119), reciting the demands of certain tenants, the announcement on December 1 of the plans of the appellee railroads for the construction of a competing facility in Kansas City, Missouri, to thwart the success of the mar-

ket; that because of the emergency, the City Commissioners felt that whatever could reasonably be done to make the market a successful project should be done immediately; the amount of money required to make settlements with the tenants in question in cash or by credit on future rentals was $142,550; the market facilities, if full occupancy was secured over a 30-year period, would produce rentals in excess of seven and one-half million dollars; the City Commissioners would be subject to severe criticism for failure to protect against the loss of such revenue; the City Commissioners had under consideration obtaining advance rental payments from certain tenants of the City, to be used in making settlements; 41 units of the market were occupied, but 14 of the dealers, occupying 23 units, had only partially moved, pending adjustment of their claims; the adjustment must be made quickly or there is almost certain danger of a very great loss of tenants (Pl. Ex. 13, R. 1946-51; offered, R. 813; 903). There was also presented a statement prepared by the Mayor and tabulated by Haugh (R. 1119-20), showing a summary of proposed adjustments for tenants of the market (Pl. Ex. 27, R. 2173-80; offered, R. 419).

The committee adopted a resolution, advising that the City should proceed promptly to negotiate with prospective tenants and determine the character and amount of costs, to be established by sworn statements, and upon agreement with respect thereto, to enter into leases on such terms and conditions as to cash payments and/or credits on future rentals as City Commissioners might determine to be necessary and proper expenses in connection with the establishment and operation of the market (K. C. K. Ex. 101, R. 2831; offered, R. 666).

Further Action to Determine Legality of Contemplated Adjustments.

The City Commissioners concluded that an opinion of the Attorney General of Kansas as to the legality of the recommended action should be secured (R. 813; 968). The Attorney General, upon being consulted by the Mayor and City Attorney, stated that the opinion of another lawyer would add nothing and suggested that the matter be presented to the Supreme Court of Kansas for adjudication and that he would file an appropriate proceeding if the City Commissioners would adopt a resolution requesting him to do so (R. 856). The City adopted Resolution 11275 (R. 814) resolving that the City proceed to negotiate with prospective tenants and to enter into leases on such terms and conditions as to cash payments or credits on future rentals as the City may determine to be necessary and proper expenses in connection with the establishment and operation of the market and requesting that the Attorney General proceed in the nature of a *quo warranto* in the name of the State against the City to determine whether the City and its Commissioners have authority to pay such sums as are necessary, in the discretion and sound judgment of the City Commissioners, to carry out such policies and transactions as may be to the best interest of the City in securing tenants for the market, and requesting the Attorney General also to raise any and all other questions as he shall deem just and proper in the premises (Pl. Ex. 62-B, R. 2654-6; offered, R. 474).

On December 18, 1939, the Attorney General filed in the Supreme Court of Kansas a petition in *quo warranto* (R. 27-59), naming the City and its officers defendants (*State ex rel Parker, Attorney General* v. *Kansas City,*

151 Kan. 2, 98 Pac. [2d] 101), alleging the adoption of Resolution 11275 by the City and that the Statutes of Kansas do not authprize the City to enter into agreements for the payment of claims of prospective lessees as contemplated by Resolution 11275, and that the making of payments and giving of credits as therein contemplated would be contrary to and in violation of the Statutes of Kansas and the ordinances of the City under which the bonds were issued and praying that the Court oust the defendants from exercising the powers purported to be vested in the defendants by Resolution 11275, and that a decree be entered restraining the defendants from expending any of the funds derived from the operation of the Kansas City Public Levee toward the payment of cash allowances to prospective tenants for the purpose contemplated by Resolution 11275, and praying for such other and further relief as the Court may deem just and equitable and proper.

There were attached to the petition as exhibits Ordinance No. 30206, authorizing issuance and prescribing form of revenue bonds, and Resolution 11275.

Defendant City and its officers filed their Answer on December 19, 1939 (R. 60-70) alleging that the City has the power to carry out the policy set out in Resolution 11275; that in securing tenants for new buildings it is a customary, usual, and necessary business requirement to negotiate with prospective tenants on the basis set out in the Resolution, and that such expenditures are reasonable and necessary expenses of operation of such new facility. That in making and fixing rates and charges for the facilities furnished, the City has investigated fully, and found that the rates and charges so fixed will enable the City to pay all expenses of operation and maintenance, meet the bond and interest requirements on due

dates as required by Resolution 11275, the ordinance authorizing the issuance of the bonds, and the Statutes of Kansas. That prior to the adoption of Resolution 11275, the City calculated the amount of rentals on existing long term leases of facilities on the Public Levee and estimated rentals from the leasing of the market facilities, and that, taking into consideration all expenses necessary for reasonable and proper operation, maintenance and repair (except payments contemplated by Resolution 11275) and the bond and interest requirements, the City will have net cash available at the end of the year beginning November 1, 1939, of $35,867. That a plan is under consideration for securing advance rental payments from certain lessees of the Public Levee, sufficient to pay the maximum cash requirements of the respective tenants. That after giving effect to the settlements and adjustments with prospective tenants by giving credits against future rental payments and to said advance rental payments to be refunded over a period of years, the City will have available in the Revenue Fund at the end of the first year $27,777, and that estimates have been made for the following two years, giving effect to the return of the advance rental payments by credit on future rentals, which show an excess of revenue over all expenditures and credits substantially in excess of the first year's estimate, and that such amount will increase yearly. That, based on the facilities being fully occupied over the thirty-year period of the bond issue, the aggregate rentals prescribed will amount to $7,542,660 and that the total of the adjustments under consideration, amounting to $142,550, is only 1.9% of the gross rentals. That the judgment of the City's governing body is that negotiations on the basis outlined will insure the successful operation of the market. That if the policy of Resolu-

tion 11275 is not pursued, it will be impossible, because of competitive activities, to secure such an occupancy of the market facilities as will insure revenue sufficient to meet the costs which the City is required by the ordinances and Statutes of Kansas to provide out of rentals from the market. That the holder of the revenue bonds recognizes that expenditures of the kind and character contemplated under Resolution 11275 are legitimate and proper expenses incident to the establishment and operation of the market and properly payable out of the revenue fund of the Public Levee and that the sums required for that purpose are not subject to the pledge or lien of said bonds. The City and its officers prayed that the prayer of the plaintiff be denied and that the Court find that the policy set forth in Resolution 11275 is not in violation of the provisions of the Kansas Statutes or of the bond ordinances, and that the City has the authority to carry out such policy, subject to the requirements of the Statutes of Kansas with respect to rates and charges sufficient to pay expenses of the City and meet the bond requirements.

Following the filing of the City's Answer, the Attorney General filed a motion for judgment on the pleadings.

The case was argued on December 19, and a *per curiam* opinion in favor of the defendant City and its officials was rendered on December 21, 1939 (151 Kan. 1; 98 Pac. [2d] 101), followed by a formal opinion on January 27, 1940, holding that "the matters proposed in the city's Resolution 11275 are the exclusive concern of the defendant city and its governing body and should not be halted by judicial interference" (*State ex rel. Parker, Attorney General* v. *Kansas City, Kansas, et al.*, 151 Kan. 2; 98 Pac. [2d] 101, l. c. 108).

Appellees' witness Bruce Hurd, an attorney for The Atchison, Topeka & Santa Fe Railway Company, testified he was directed by Charles H. Woods, General Solicitor of that company, to attend the hearing (R. 662-3); that T. M. Lillard, an attorney for the Union Pacific, made a statement to the Court that he represented the bondholder, the Union Pacific, which had expended approximately $500,000 in tracks and facilities to serve the new market, and was interested in its successful operation; and, as witness recalled it, "that he (Lillard) said to the Court that the question before the Court was on a motion for judgment on the pleadings, which had the effect of the Court having to take as admitted all of the allegations in the Answer. * * * As I recall it, he made a statement to the effect that it was shown in the Answer that the amounts proposed to be expended by the City for these moving costs and other costs that have been discussed in the argument and free or reduced rentals would be about 2% of the total income, as I recall it, total revenue from this market over a 10-year period," and "the bondholder felt that in order to have the market a success, it was necessary to have over there dealers who were the leading dealers in the market; that it would take that to make a success of it. In substance, he stated that the Court should not interfere judicially with that administrative action on the part of the City" (R. 664).

Action of City to Carry Out Policy Declared in Resolution 11275.

Following the opinion of the Supreme Court of Kansas, the City adopted Ordinance 31142, providing for the making of leases on the basis outlined in Resolution 11275 (Pl. Ex. 62-B, R. 2658; offered, R. 474).

The balance then available in the City's revenue funds was insufficient to make such cash settlements as might be approved by the City. The City had inquired whether Union Pacific would make advance rental payments for that purpose, and had been informed by Haugh that Union Pacific would not advance any rental payments. Negotiations were entered into by the City officers with City Ice & Fuel Company for advance rental payments to the City under the long term lease of the cold storage plant (R. 816; 904), which resulted in the City Ice & Fuel Company making an advance rental payment of $80,000, to be credited on rentals accruing under its lease over a five-year period (Pl. Ex. 62-B, R. 2661; offered, R. 474).

The agreement of the City Ice & Fuel Company to advance the $80,000 and to waive interest in consideration of the extension of the City's contract with the City Ice & Fuel Company covering refrigeration was negotiated by the Mayor and appellees' witness Sinek (vice-president of the Ice Company) by telephone (R. 528; 904-5). Union Pacific had no part in negotiating either of these contracts (R. 519-21; 917), although at the request of the City Attorney, attorneys for Union Pacific prepared two or three forms of contract respecting the advance rental payment, which were submitted to and reviewed by him and all but one eliminated (R. 853-5). The form used was neither Form A nor Form B, referred to in Plaintiffs' Exhibit 12 (R. 1770-1; offered, R. 418), but was a form on the basis suggested by the City Attorney which he approved (R. 855). On request of the Mayor, the contract for the $80,000 advance rental payment, on the form approved by the City Attorney, was forwarded to Sinek by Haugh (R. 905; Pl. Ex. 12, R. 1788; offered, R. 418). The contract covering the refrigeration service was consummated (Pl. Ex. 62-B, R. 2664; offered, R. 474).

Meeting of City Commissioners, Citizens' Advisory Committee, and Legal Committee on Produce Dealers' Claims.

After the advance rental payment of $80,000 was made by the City Ice & Fuel Company to the City, Litman, a produce dealer who had made a claim for damages, in response to invitation, attended a joint meeting of the City Commissioners, the Citizens' Advisory Committee, and the Legal Committee, at which he presented a verified claim of costs incident to moving to the new market, totaling $22,425 (R. 818; Pl. Ex. 62-B, R. 2675; offered, R. 474). The City required that tenants with whom adjustments were to be made should give a surety bond, conditioned upon faithful performance of their lease. After discussion, Litman agreed to accept $15,135 in full settlement, and claim was approved by the City in that amount. Litman signed the lease and was requested to furnish a surety bond. The transaction occurred on December 28, 1939, but because of the institution of this suit was not concluded (R. 818-19). This was the only transaction where any definite agreement was reached between the City and a produce dealer for the payment of damages by the former to the latter (R. 906).

On the trial, Litman, called as a witness for the appellees, testified that the amount of $12,725 shown on his verified claim for cost of unexpired rentals on leases was not correct; that he had made some mistake; that he had only an option to renew, for a period of four years, a lease which would expire in three or four months (R. 552). There was no evidence of knowledge on the part of any of the other defendants of the erroneous statement in Litman's sworn claim.

The Undisputed Evidence Discloses No Payments Were Made or Offered by Union Pacific.

Appellees' witness, Ira Burns, counsel for Mallin Produce Company, questioned the City's right to make the payment (R. 449) in a discussion with Stanley, who told him "There wasn't any Union Pacific money in the matter; that it was Kansas City, Kansas, money." Burns told Stanley that his client of course "wouldn't take a cent of Union Pacific money or benefit" (R. 450). In response to his inquiry as to why Stanley was giving the matter any attention, Stanley told him it was just a matter of accommodation for Kansas City, Kansas, who didn't have the organization or men to handle all the details in the time they had to do it (R. 451). "It was definitely understood that Union Pacific was not paying a single cent in connection with the project. He always knew that Stanley wasn't offering anything as his money or Union Pacific money" (R. 453).

Appellees' witness Cherrito testified that he had talked with DeOreo and had met Stanley (R. 454); he had attended meetings of the Brown-Cooksey-Stanley Committee with other produce dealers (R. 455) where he had discussed his moving costs. In his discussion with Stanley the latter told him "That Union Pacific couldn't make him any allowance or pay him anything" (R. 456), "told him a couple of times the Union Pacific wouldn't pay anything" (R. 457). Appellees' witness Ziegler was informed by Stanley that the payments under discussion were to be made by the City of Kansas City, Kansas, and "told him very positively that the Union Pacific Railroad Company wouldn't pay anything; that the Union Pacific couldn't even give the witness a cigarette" (R. 460).

Appellees' witness Littman testified that Kansas City, Kansas, was to pay him the money covering his damages, and he was never told by anyone that any of the money was to be paid by the Union Pacific directly or indirectly (R. 555).

Appellees' witness Sheehan testified that "Stanley said positively the Union Pacific couldn't pay one red penny to anybody" (R. 472). That neither he nor any member of his firm ever suggested that the Union Pacific give any concession with respect to his firm moving to the food terminal (R. 1198).

Appellees' witness Harry Robinson testified that it was his understanding that the City of Kansas City, Kansas, was to make the adjustments (R. 569).

Si Yukon, another of appellees' witnesses, testified that "As respects adjustments, Stanley informed the Committee that they were to be made by the City of Kansas City" (R. 609).

Appellees' witness Winnick testified that "He understood that the Union Pacific Railroad Company could not and would not pay anything, that Mr. Stanley told him he couldn't pay him a nickel," and that it was his understanding that if any money was to be paid it would be paid by the City of Kansas City, Kansas (R. 613).

Appellees' witness Sol Junsberg testified that he discussed the matter of expenses for moving with DeOreo, who advised him that he had no authority to promise anything (R. 738), but "would put it up to Kansas City, Kansas" (R. 1154). He said that he negotiated with Skinner, who advised him that he would let him know, but he never received any response (R. 737).

Appellees' witness Frank DeMarea testified he had seen Mr. Stanley once and asked him about rumors that

leases and moving expenses were to be taken care of. Stanley said "There is nothing he could suggest; that if I had anything in mind I would have to go over and talk to the officials of the City of Kansas City, Kansas" (R. 1153).

Appellees' witness Henry Baum had a discussion with the Cooksey-Brown-Stanley committee regarding payment for tomato rooms, etc., and "he understood that the City was to make the payment. That Stanley told him the payment would be made by the City and that the Union Pacific could not and would not pay him anything" (R. 1258).

Appellees' witness Marshall testified that he was advised by Mr. Stanley "that he could make no agreement for the amount of $10,000 or any other amount, but that Stanley would submit the proposition to the City of Kansas City, Kansas" (R. 717); "that Mr. Stanley, Mr. Weedin or Mr. Haugh did not at any time make any offer to him and that he did not receive anything from any of them" (R. 718).

When informed by DeOreo that the tenants were seeking adjustments, Stanley told DeOreo that Union Pacific could do nothing about it, but that he would report the matter to the officials of Kansas City, Kansas, which he did. "He told the Board of City Commissioners and everybody else when the matter was mentioned that the Union Pacific could not make any adjustments with tenants." "That if any adjustments were made, they would have to be made by Kansas City, Kansas." "He told the tenants on many occasions at a later date that they would have to present their claims to the City of Kansas City, Kansas, and not to the Union Pacific" (R. 1048). "That he did not talk to the Board of City Commissioners with respect to the Union Pacific advancing

money with which the City could pay adjustments to prospective tenants" (R. 1066). That the problem referred to in the telegram, Plaintiffs' Exhibit 10 (R. 1742-3; offered, R. 418), dated June 28, 1939, calling attention to the Elkins Act and stating that "if City in Kansas can lawfully commit itself to railroad, the latter should be safe in advancing funds to City and City will then have its own relation with its prospective tenants," had reference to advancing funds to the City to enable the City to rent temporary quarters for prospective tenants who had been notified their old quarters in the Kansas City, Missouri, market were to be torn down, which was thought to be an effort to force those tenants to rent stalls in the new Missouri market. That he reported the matter to the City Comissioners, and phoned Ess, that the City wanted to know if the Union Pacific could advance any money for that purpose but "there was not one cent of money advanced by the Union Pacific for the purpose" and nothing was done about it R. 1066-7).

Haugh testified that he had informed persons who inquired concerning the claims of tenants "That it wasn't at all possible for the Union Pacific, in any way, to meet any of these plans" (claims) (R. 1118). "I told them the Union Pacific could not in any way whatsoever" make any payments (R. 1121). He told the Mayor that the Union Pacific would not make any advance rental payments (R. 904, 1122).

Extension of Credit by Riverview State Bank to Dealers.

Appellees' witness Breidenthal, as a member of the Legislative and Industrial Committees of the Chamber of Commerce, had assisted City officers in supporting

legislation in 1933 covering issuance of revenue bonds to permit cooperation with the Federal program. He made many trips to Washington at his own expense in support of the City's elevator project; had actively assisted for the last five years in many City projects, including the market and various W. P. A. projects; and had done a lot of work with Army Engineers and the Secretary of War on flood protection in the City and throughout the state. He arranged with Secretary Wallace for the market survey by William C. Crow (R. 659-60), participated with City officers in their negotiation with investment bankers on the sale of the revenue bonds over a period of two years, and in preliminary negotiations between the City and Fean and DeOreo. He made many trips to Washington with City officers at his own expense in support of the market application (R. 661). In July or August, 1939, Breidenthal discussed with members of the Merchants' Committee and with representatives of Kansas City, Kansas, banks the organization of a bank to be located on the market. The Committee thought such a bank was a necessity (R. 650) and Dudley Brown's name was mentioned for President. Later in November, 1939, in a casual meeting with Brown and Graham Cooksey, he learned it had been reported on the street that the merchants who left Missouri would be required to pay their obligations. Breidenthal agreed to give the problem consideration and render assistance if he could (R. 651). The witness had met Sinek in company with City officers on his first visit to Kansas City and had participated with them in negotiations with City Ice & Fuel Company for the lease of the cold storage plant (R. 665). Since his bank was not familiar with the produce business, he desired some guarantee before making loans to dealers (R.

6658). He telephoned Sinek that the tenants of the Kansas City market were having trouble on account of their credit being shut off by the Missouri banks and asked Sinek to come to Kansas City. Sinek was unable to come, but sent Rhode and Aaron, his attorney (R. 519-20). Rhode phoned Sinek, confirming Breidenthal's report as to the serious situation of the merchants because of the action of the Missouri banks. City Ice & Fuel Company having obligated itself for $600,000 rental under its lease, Sinek talked to Breidenthal, and at his request agreed to deposit $25,000 as a guaranty to the bank against loss on loans which the bank might make (R. 520-1). An exchange of letters between City Ice & Fuel Company and the Riverview State Bank (Pl. Ex. 71, R. 2738-40, offered, R. 533) constitutes the agreement made with respect to the guaranty (R. 521). Neither Haugh nor any other Union Pacific official had anything to do with this arrangement (R. 520-1). Briedenthal's bank had no other guaranty on loans than that of City Ice & Fuel Company, evidenced by Plaintiffs' Exhibit 71 *supra,* R. 658). Under this guaranty arrangement, Riverview State Bank made loans to tenants of the market aggregating $95,748.16 (R. 656). Part of these loans were secured; part were based on financial statements; and part on credit ratings in the Blue Book (R. 657-8). Up to February 8, 1940, $13,915.44 had been repaid (R. 656).

Radio Programs Advertising Union Pacific Rail Facilities.

Radio Station KMBC, for about one and three-fourths years, broadcast a program known as the Food Scout, giving information concerning fresh fruits and vegetables. Union Pacific became the sponsor of this program to

be broadcast from the Kansas City Food Terminal upon the understanding set forth in Plaintiffs' Exhibit 108 (R. 2857-8; offered, R. 688) which provides:

(1) That the food program conducted by KMBC is a service program and would be continued only as such. That it would contain unbiased, unprejudiced information and news concerning fresh fruits and vegetables to be judged solely on its interest and value to the housewife. KMBC will continue to maintain complete control as to the format, content, and method in which commercials are handled.

(2) That the sponsorship is available with the understanding that not more than three separate and distinct commercials will be permitted with a total word count of not to exceed 450 words; that in this case the commercial sponsor is the Union Pacific Railroad and the product to be advertised is the *Union Pacific rail facilities.* Commercials involving other products will not be accepted.

(3) That use of commercials for promotion of the *market rather than the Union Pacific Railroad will not be permitted, nor will promotion on the market be acceptable as a part of the program content.* References to the market facilities, which are of interest and necessary to identify the remote origination, are, of course, noted but only under these circumstances, but even then such references will not be permitted to contain any comparative or superlative statements involving any other market.

(4) Because of code of National Association of Broadcasters, controversial issues will not be permitted.

Interest of the Four Appellee Railroads in Opposing the Public Levee Development.

Appellees' witness Davis, traffic representative of the appellee Santa Fe, testified that the Chicago Produce Terminal is the terminal of the Santa Fe in Chicago, and that it was the desire and objective of his railroad like that of most railroads, to get the long haul on traffic; that he liked to haul fruits and vegetables to Chicago, because the Santa Fe got the long haul and more revenue; that the carrier on whose line the produce facilities are located has the advantage; that while the Chicago Produce Terminal is a joint terminal of the Santa Fe and the Illinois Central, the Illinois Central does not run to California or the Southwest, and so far as the Southwest and California are concerned, the Santa Fe has no competing line in the Chicago Terminal; that the Chicago Produce Terminal is no exception to the general rule that they have traffic control because of their ownership of the facility; and that the Chicago Terminal is open to other railroads under absorption switching tariffs under which the road haul carrier absorbs the tariff charge (R. 701-2).

In a letter from S. T. Bledsoe, President of the Santa Fe, to Mayor McCombs, dated September 16, 1938, reference was made to a conversation had by the former with the Mayor in Washington, in which Bledsoe stated that the construction of the Terminal as planned would be detrimental to the interests of the Santa Fe; that under the proposed arrangement there would be located on one of the 13 railroads serving Kansas City a market "to which the other railroads would have access only through a switching arrangement"; that "the Santa Fe and Union Pacific are direct competitors for most of the

perishable traffic entering Kansas City from the west and the location of a produce terminal exclusively on one of these lines * * * would give a tremendous advantage to the line serving the terminal in securing business from the origin territory" (K. C. K. Ex. 217, R. 3023; offered, R. 890).

Missouri Pacific was asking for a 50% advantage in the switching charge over other railroads (R. 794; K. C. K. Ex. 186, R. 2966; offered, R. 796). In December, 1938, Skinner, City Attorney, had a conversation with White, General Manager of Missouri Pacific, who stated that Union Pacific would not be a competitor of the Missouri Pacific for eastbound traffic out of Kansas City, and Skinner advised White that was one of the reasons why the City thought the other railroads were entitled to have a road terminating in Kansas City so that there could be no advantage on the east bound traffic (R. 796).

At a meeting held in the Union Station, Kansas City, Missouri, just prior to the opening of the market on December 4, 1939, attended by the officers of the appellant City, the Chief Executive Officers of the four appellee railroads, Haugh of the Union Pacific, and representatives of civic bodies of Kansas City, Kansas, Mayor McCombs read his letter to the President of the Santa Fe, asking for a meeting with the appellee railroads before they determined to build a competing facility in Kansas City, Missouri. He stated that the City of Kansas City, Kansas, was anxious to have all the railroads in its market, and that its grant from the Public Works Administration was conditioned that the facilities be made available to all railroads (R. 969-70).

City officers and representatives of civic organizations urged the appellee railroads to cooperate in serving the Kansas market. Haugh offered to work out an arrange-

ment for the joint use of the trackage serving the market, which could be concluded on the arrival of the President of the Union Pacific the next day. Budd, President of the appellee, Chicago, Burlington & Quincy Railroad Company, for the appellee railroads, rejected the proposal to negotiate, stating "that he understood that all the railroads could use the facilities but that was not the point in question. The point in question was the soliciting advantage that the Union Pacific would have in the West," and "he thought nothing could be accomplished in such a meeting" (R. 970, 1124). Immediately following this meeting, the executives of the four appellee railroads had a meeting in the office of the Mayor of Kansas City, Missouri, at which they arranged for and announced the construction of competitive facilities including a viaduct at Grand Avenue, Kansas City, Missouri (Pl. Ex. 13, R. 1949; offered, R. 418).

December 19, Hurd, Kansas attorney for the appellee Santa Fe, on instructions of its General Solicitor, attended the hearing of *State ex rel. Parker* v. *Kansas City* (*supra*), in the Supreme Court of Kansas. The *per curiam* decision of the Court was rendered on December 21. On December 22 the Interstate Commerce Commission, upon consideration of a Bureau of Inquiry memorandum dated December 22, requested the Attorney General to institute this action (Pl. Ex. 52, R. 2426; offered, R. 433).

On December 26th and 27th, Marsh, Special Agent of the Interstate Commerce Commission, investigated the files of the executive offices of Union Pacific at Omaha (R. 433). The Complaint in the Court below was filed December 29, 1939, accompanied by affidavits of Hurd (R. 72), Marsh (R. 74), Fitzgerald, Traffic Officer of

the Santa Fe (R. 83), Curran, Traffic Officer of the Burlington (R. 85), Meade, Traffic Officer of the Rock Island (R. 87), Watson, Traffic Officer of the Missouri Pacific (R. 88), and Hart, Traffic Officer of the Burlington (R. 89). On the same day, counsel appearing for the Interstate Commerce Commission in the Court below, requested that appellees Santa Fe, Rock Island, Burlington and Missouri Pacific and Kansas City, Missouri, be made parties plaintiff. The application was renewed January 3 and granted (R. 400).

Valuation Studies by Interstate Commerce Commission of the Market and Rates of Return Thereon.

Upon final hearing, elaborate studies and reports of an appraisal of all the market facilities, including the Public Levee lands, the produce buildings, cold storage plant, and farmers' market, by the Bureau of Valuation, Interstate Commerce Commission, were offered in evidence by the appellees.

Planitiffs' Exhibit 271 (R. 3259-3322; offered, R. 1213) is a report of the Land Section, Bureau of Valuation, I. C. C., showing the appraisal by the witness Hopkins as of March 31, 1940, of the Public Levee land and contains the detailed appraisal notes and summary of land areas and values. It assigns to the land occupied by the market buildings a value of 50 cents per square foot or $21,780 per acre in its filled condition (R. 3317); and to the land occupied by the team track yard a value of 40 cents per square foot or $17,424 per acre (R. 3318).

As of 1935, the same witness appraised the right of way of the Missouri Pacific upon or adjacent to the Public Levee, the right of way of the Chicago Great Western where its elevator is located, and the right of way of the

Union Pacific immediately adjacent to the Public Levee on the west at 8 or 10 cents per square foot (R. 1215-16). The land immediately north of the Public Levee was purchased by the Phillips Petroleum Company at $1,500 per acre (R. 1223).

The appraisal of the Public Levee land follows the methods employed by the Interstate Commerce Commission in valuing the lands of common carriers under Section 19(a) of the Interstate Commerce Act and conforms with the decision of the Supreme Court of the United States in *Minnesota Rate Cases*, 230 U. S. 352 (R. 3260).

No consideration was given to the fact that the lands were inalienable (R. 1217, 1220) or to the nature of the City's title, and the witness valued the Public Levee lands as he would value privately owned lands (R. 1210).

The land was appraised as property used for wholesale and industrial purposes and as filled and graded to the present level though the funds for grading and filling the land came from Government grants made for aid in employment and public works and from revenue bonds of the City. The appraisal figures did not include streets, sewers and water pipes included in the engineering valuation (R. 1221).

Plaintiffs' Exhibit 275 (R. 3357-3362; offered, R. 1229) purports to show original cost as of March 31, 1940, of the market facilities as developed by the Accounting Section of the Bureau of Valuation, including the cost of City's four produce buildings, the farmers' market, the cold storage building, including equipment, water mains, refrigeration lines, wiring, flood lighting, sewers, grading, paving, and railroad tracks, to be $3,282,658 (R. 3361).

Facilities owned by the City and not considered

applicable to the market, amounting to $273,246, were excluded (R. 3362).

Plaintiffs' Exhibit 277 (R. 3367-3416; offered, R. 1236) purports to show cost of reproduction new and cost of reproduction less depreciation separately, of the facilities owned by Union Pacific and those owned by the City, including the four house tracks serving the produce buildings (R. 3403-7), as ascertained by the Engineering Section of the Bureau of Valuation, ICC.

Plaintiffs' Exhibit 279 (R. 3436; offered, R. 1238) shows the cost of reproduction new of the miscellaneous facilities such as paving, drainage, water mains, sewers and railroad tracks as allocated by the Engineering Section of the Bureau of Valuation, ICC, to the revenue producing structures owned by the City.

Plaintiffs' Exhibit 280 (R. 3437; offered, R. 1239) is a report of the normal service life of the component parts of the property owned by the City, compiled by the Engineering Section of the Bureau of Valuation, ICC.

Plaintiffs' Exhibits 271, 275, 277, 279 and 280 and the testimony of appellees' witnesses Hopkins, Manly, Brown, Boice, Gasaway and Hansbury as to the appraisal and valuation of the market facilities were admitted in evidence over the objection of the appellant City (Assignment of Error No. 26, R. 391-5).

Upon the basis of the cost of reproduction new, plus the value of the Public Levee land as shown by the preceding exhibits offered by witnesses from the Bureau of Valuation, and using the income and expenses shown by the City Auditor in K. C. K. Exhibit 228 (R. 3044; offered, R. 947) and K. C. K. Exhibit 229 (R. 3047; offered, R. 949), appellees' witness Reeves, with many years of experience as a statistician of appellee Santa Fe (R. 1268) found an annual net income above expenses

for the entire Public Levee property of $220,698, and for the City's market facilities alone of $109,472 after deducting depreciation on improvements, amounting to $65,388 per annum (Pl. Ex. 286, R. 3464-5; offered, R. 1269).

Reeves allocated or apportioned each item of revenue and expense between the cold storage plant, farmers' market, produce buildings A, B, C and D, and the merchants' building, including the estimated amounts to complete building C and the merchants' building (R. 1268); calculated depreciation by applying service life shown by Plaintiffs' Exhibit 280 (R. 3437; offered, R. 1239) to the various items (R. 1269), and showed that the City would receive, upon the basis of the revenues and expenses estimated by the City, a net return equivalent to 2.03% upon the cold storage plant, .62% upon the farmers' market, 3.60% upon the four produce buildings, 3.80% on the merchants' building, and 2.82% for the land leased for the team track yard, a combined net return of 2.83% after depreciation (Pl. Ex. 286, R. 3465; offered, R. 1269).

In Plaintiffs' Exhibit 287 (R. 3466-7; offered, R. 1271) Reeves, upon the same basis, segregated the cost of reproduction, the value of land, revenues and expenses as between the four produce buildings and demonstrated that after charging depreciation the City would derive a net return upon the value of the four produce buildings, including the Public Levee land and federal grant allocated to each, as follows:

From Produce Building A	3.65%
From Produce Building B	3.83%
From Produce Building C	3.94%
From Lower Floor of Produce Building D	3.27%
From Upper Floor Offices of Produce Building D	2.44%

Upon examination by the Court, Reeves testified that Exhibits 286 and 287 did not reflect any use of the depreciation of $65,388 annually charged against the market facilities (R. 1272). "I have no idea what the City might be able to invest its funds at. It is paying 4% on its bonds. Conceivably, it could invest in the same bonds, and thus save 4%. In other words, 4% saved is 4% earned." If the City did not buy its own bonds "I think they would be fortunate to earn 2%" (R. 1274). "In conditions as they exist today, with money practically going begging for investment, a return of 3 to 4%, I could not characterize as ridiculously low" (R. 1275). In the calculations of rates of return Reeves assumed that the City was the owner of the land on which the improvements were situated and included the grant from the Public Works Administration of $1,710,000 and funds that were provided by the City by various means (R. 1282).

He made no calculations to determine what amount would be saved by the City if the $65,000 annual depreciation charge were used to retire the bonds (R. 1282).

By Kansas City, Kansas, Exhibit 376 (R. 3448; offered, R. 1386-7), it is shown that a total of $1,765,476 of the principal amount of the revenue bonds could be retired at maturity by use of the accumulated depreciation reserve. An interest saving to the City of $1,088,666.56 or $36,288.88 per year would result by the use of the depreciation reserve alone to retire bonds as against the total interest which would be payable if such funds were not so used.

K. C. K. Exhibit 364 (R. 3831; offered, R. 1383) shows a return after depreciation of 4.06% upon the produce buildings and of 3.26% upon the combined facilities,

excluding from the rental base of Plaintiffs' Exhibit 286 the value of the Public Levee land.

In K. C. K. Exhibit 365 (R. 3832; offered, R. 1384) the amount of the federal grant is excluded from the rental base in Plaintiffs' Exhibit 286, resulting in a net return after depreciation of 5.98% upon the four produce buildings, and upon the combined market facilities of 4.64%.

By K. C. K. Exhibit 366 (R. 3833; offered, R. 1384) the rate of City's net return after depreciation, excluding from the rental base of Plaintiffs' Exhibit 286 both the value of the Public Levee land and the amount of the federal grant, is shown to be 7.39% upon the four produce buildings and a combined rate of return of 5.92%.

Kansas City, Kansas, Exhibits 368 (R. 3835; offered, R. 1385), 369 (R. 3836; offered, R. 1385), and 370 (R. 3837; offered, R. 1385) show the rate of return after depreciation upon each of the produce buildings separately, excluding from the rental base in Plaintiffs' Exhibit 287, respectively, the value of land, the amount of the grant, and both land and grant.

Similarly, Plaintiffs' Exhibit 288 (R. 3468; offered, R. 1271) which showed rentals of from $152 to $158 for the units in the produce buildings to be required on the basis of 90% occupancy to produce a 4% net return after depreciation was modified by K. C. K. Exhibit 372 (R. 3840; offered, R. 1386) to exclude the value of the Public Levee land included in the plaintiffs' rental base, resulting in monthly rates of from $140 to $146 per month for produce dealers' units; and by K. C. K. Exhibit 373 (R. 3842; offered, R. 1386) to exclude from the plaintiffs' rental base the amount of the federal grant, result-

ing in rates of from $112 to $120 for the produce dealers' units.

K. C. K. Exhibit 374 (R. 3844; offered, R. 1386) excluding from the rental base of Plaintiffs' Exhibit 288 both the value of the land and the amount of the federal grant, shows a net return of 4% after depreciation could be realized with 90% occupancy of the produce dealers' units at rentals of from $101 to $107 per unit.

Kansas City, Kansas, Exhibits 228 and 229 introduced in evidence March 11, 1940, except for the addition of depreciation, were accepted by appellees' witness Reeves in his Exhibits 286 (R. 3464; offered, R. 1269), 287 (R. 3466; offered, R. 1271), and 288 (R. 3468; offered, R. 1271) offered May 1, 1940. On May 9, 1940, the City's witness McIntyre testified as to the effect of this litigation upon the occupancy of the market. "If it keeps on, I don't believe there will be anything there." He was satisfied it is less than 35%. That the results have been handicapped because of the injunction suit, but when the market gets going he will stand on his estimated figures (R. 1388).

The Kansas City, Missouri, Market.

Appellee City of Kansas City, Missouri, has a market comprising buildings devoted to the handling of produce at wholesale and retail and farmers' facilities (R. 1358, 1364). The location and character of the buildings are shown on U. P. Exhibit 349 (R. 3762A; offered, R. 1360) and U. P. Exhibit 350 (R. 3762B; offered, R. 1370). The wholesale buildings are rented at $40 to $75 per month. (R. 1359; U. P. Ex. 360, R. 3806; offered, R. 1372). The farmers' stalls are rented at $3.00 per month seven months per year, plus 25 cents a day for each day used. Prior to April 15, 1940, no rents were charged

or collected on the wholesale buildings and no rentals "have been charged or collected by the City for the retail buildings as yet" (R. 1360). There are 28 wholesale units in the market, 17 retail units, and the farmers' section. The Missouri market is not served by trackage, and no refrigeration facilities are provided (R. 1361). In an attempt to overcome in part the disadvantage which the market had because of lack of rail facilities appellees planned the construction of a viaduct estimated to cost $315,000 (U. P. Ex. 350, *supra*; R. 1365-6), to furnish a means of transportation for perishables by truck between the contemplated team track yard being constructed by the appellee railroads and appellee City's market (R. 1366). An agreement was reached by the appellee City and the four appellee railroads that if the latter would advance the entire cost of constructing the viaduct, the City would reimburse the railroads to the extent of $125,000 and the balance of the cost, approximating $190,000, would be borne by the railroads (R. 1367; U. P. Ex. 353, R. 3781; offered, R. 1370). Appellee railroads employed engineers to draw plans for the viaduct (R. 1369).

In connection with the contemplated development of its market, appellee City granted trackage rights to the Missouri Pacific and leased various parcels of public property to the appellee railroads (R. 1368-9; U. P. Ex. 354, R. 3786; offered, R. 1370; U. P. Ex. 356, R. 3795; offered, R. 1370).

Cost of the appellee City's market, as determined from an examination of its books and records by Certified Public Accountants, is $921,692.29 (R. 1374; U. P. Ex. 361, R. 3809; offered, R. 1374).

The potential revenue, based on leases in effect and estimates furnished by appellee City's Market Master,

is $37,070 per annum (R. 1380). The estimated operating cost constituting only out-of-pocket expenses, with no allowance for depreciation, which were developed by Certified Public Accountants after discussion with appellee City's officers, is $13,000 per annum (R. 1380). The net income of the market after depreciation but before interest charges is $10,634.07 per annum or 1.15% (R. 1381; U. P. Ex. 362, R. 3820; offered, R. 1381).

Rate of Return on Leases by Appellee Railroads to Shippers.

In the Court below appellees insisted that the City's market should not be rented at rates of return which did not yield 6% per annum after depreciation as a minimum adequate return on the value of the facilities leased (Appellees' requested finding of fact 42, R. 319). Appellees asked that the Court below find that the rate of return or absence of return upon leases made by the appellee railroads with shippers had no relation to or bearing upon the rate of return which the appellant City should be required to earn (Appellees' requested findings of fact 43, R. 319-20; 46, R. 321; 47, R. 321-2; 48, R. 322; 49, R. 322-3; 50, R. 323).

Appellee Rock Island leases a substantial portion of its freight house to A. Reich & Sons who conduct a wholesale produce business and are receivers and shippers in interstate commerce by rail (R. 1310; U. P. Ex. 292, R. 3478; offered, R. 1312; U. P. Ex. 293, R. 3489; offered, R. 1312). The house track of the Rock Island Railroad immediately adjoins the leased premises so that the lessee can unload cars of perishables directly onto the dock of its quarters immediately adjacent to the track (R. 1314; U. P. Ex. 294, R. 3496A; offered, R. 1310). Because of the good railroad accommodations, A. Reich &

Sons expanded their business to a greater degree than any wholesale merchant in the city. (Pl. Ex. 13, R. 1834; offered, R. 418). On the side of the building opposite to the railroad tracks perishables can be loaded on trucks (U. P. Ex. 339, R. 3749; offered, R. 1351). The building is equipped with banana, celery, and tomato rooms (U. P. Ex. 299, R. 3527; offered, R. 1322) and with refrigeration rooms (U. P. Ex. 297, R. 3498; offered, R. 1319). Under the lease Rock Island derived a return of 1.94% per annum upon its recorded investment as reported to the Interstate Commerce Commission plus the Interstate Commerce Commission's valuation of land before deducting any expense incurred by it for depreciation, heat and water furnished the tenant, maintenance and repairs borne by the Rock Island, and taxes. (U. P. Ex. 392, R. 3487-8; offered, R. 1423).

All of the appellee railroads have large grain elevators in the vicinity of the Kansas City food market and have leased them to shippers. Data with respect to the appellees' investment in these facilities, as reported to the Interstate Commerce Commission and the Interstate Commerce Commission's appraisal of land values are shown on Union Pacific Exhibits 303 to 338, both inclusive (R. 3549-3748; offered, R. 1326-1350). Data from these exhibits were tabulated in Union Pacific Exhibit 391 (R. 3886; offered, R. 1422), showing the average reported book value, net income before depreciation, and rate of return for the three years 1937, 1938, and 1939 with respect to each of such elevators as follows:

	Reported Book Value	Net Income Before Depreciation	Rate of Return
A T & S F	$3,828,012	$52,644	1.38%
Rock Island	$1,217,046	—$ 6,418[1]	Deficit
C B & Q	$1,171,985	$25,671	2.19%
Missouri Pacific Elevator B	$1,464,836	$44,346	3.03%
Eagle Elevator	$ 252,692	$ 3,935	1.56%

[1]Deficit.

Rate of Return in Other Cities on Facilities Comparable With the Kansas City, Kansas, Market.

The Bronx Terminal Market in the City of New York, with an investment of $16,684,975, of which about one and a half million dollars was contributed by the Public Works Administration in 1938 (R. 1406) had a gross income for the year 1938 of $312,998, with operating expenses of $131,455, and the net return of the Bronx market for that year, before taxes or depreciation, was $181,543, or 1.08% on its total investment (R. 1406).

FINDINGS OF FACT OF THE DISTRICT COURT.

The Court below refused all findings of fact tendered by appellant City and the separate findings of fact tendered by appellant Union Pacific. Except in particulars hereinafter noted, it gave all findings of fact substantially as tendered by appellees.

In so far as material here, the Court found:

1. In 1936 Fean and DeOreo came to Kansas City and entered into arrangements with Union Pacific officers for the promotion of a perishable food terminal on the Public Levee of Kansas City, Kansas (FF 9, R. 343).

2. For the purpose of increasing the volume of its perishable traffic, Union Pacific in December, 1936, and January, 1937, formed a plan to finance the market through the City and the Public Works Administration and to have the market owned by the City, so that it would be free from taxation, as a consequence of which produce dealers would be enabled to rent facilities at low rentals, thereby giving them an advantage over other shippers who would be required to pay rentals on the basis of capital costs (FF 10, R. 343-4).

3. Union Pacific procured plans and estimates for the market from engineers and interested the City in the development thereof, and since January 1, 1937, the City, its officers, Union Pacific, DeOreo and Fean, and other persons, have engaged in the promotion, financing, construction and completion of the market (FF 11, R. 344).

4. Union Pacific originated the plan for:

(a) Issuance of revenue bonds by the City;

(b) Obtaining a grant from the United States;

(c) Obtaining passage of state legislation for the sale of revenue bonds (FF 12, R. 344-6).

5. Union Pacific assisted the City:

(a) In obtaining legislation;

(b) In seeking a purchaser for the bonds;

(c) In supervising the building of the market;

(d) In securing a tenant for the cold storage facilities;

(e) In making payments to leasing agents through its subsidiary, Kansas City Industrial Land Company;

(f) In securing tenants for the market;

(g) In its own officers and those of its subsidiary rendering services in connection with the leasing, promotion and financing of the market;

(h) In advancing large sums of money to the City for its preliminary expense, no part of which has been repaid (FF 12, R. 344-6).

6. Union Pacific assisted in obtaining grant from Public Works Administration, offered to make a limited guaranty of the revenue bonds, as suggested by Stifel, Nicolaus & Company, investment bankers, and thereafter, refusing to guarantee full interest requirements, Union Pacific purchased $3,000,000 principal amount of revenue bonds issued by the City, the payment of which is secured only from revenues derived from the Public Levee and, therefore, such bonds were speculative and not salable in the ordinary course of commercial investment business (FF 13, R. 346-7).

7. The City, at the suggestion of Union Pacific, entered into a contract with DeOreo and Fean as its leasing agents, agreeing to compensate them for services rendered upon a commission basis; Union Pacific cooperated with City officers in bringing about a cancellation of the Fean and DeOreo contract to meet the requirements of the Public Works Administration; since cancellation of the contract Fean and DeOreo have continued in various activities in connection with the promotion and operation of the market and under an arrangement made with them

by the Union Pacific in December, 1938, Kansas City Industrial Land Company has paid them $350 a month each (FF 14, R. 347-9).

8. The City leased to Union Pacific a portion of the Public Levee to construct a team track yard so that the market might be served by the rails and tracks of the Union Pacific, which alone reaches the market, except for a track jointly used by Missouri Pacific and Union Pacific leading to the cold storage plant (FF 15, R. 349); the team track yard was constructed by Union Pacific at an approximate cost of $603,000; legal title to the cold storage plant, produce dealers' buildings, farmers' market, and trackage appurtenant to the market buildings, is held by the City; and the market was constructed with $1,710,000 procured by the federal grant, $1,967,000 proceeds of revenue bonds, and $149,000 derived from general obligation bonds of the City or from taxation, making a total cost of the market to the City of $3,826,000 (FF 16, R. 349-50).

9. Since its opening, on December 4, 1939, the City has been operating and managing the market and other facilities appurtenant thereto, while the Union Pacific has been operating the team track yard and other railroad facilities forming a part of the terminal; Fean had managed the Heart of America Growers Association, an organization composed of farmers, with funds provided by Union Pacific; the City and Union Pacific agreed with tenants of the produce market that it should be managed by the Kansas City Food Terminal Association, organized by DeOreo, Fean, Sarser, Robinson, DeFeo, and DeMaria (FF 17, R. 350). It was the purpose of the City and Union Pacific to induce produce dealers to transfer their business from Kansas City, Missouri, to the

new market and to accomplish such a purpose they have been assisted by DeOreo and Fean who were agents of Union Pacific from November, 1938, to December 29, 1939 (FF 18, R. 350-1).

10. Prior to the opening of the market, Union Pacific conceived a plan, approved by the City and in which the latter cooperated and joined, for raising funds to make cash payments, free rentals, reduced rentals, free advertising, free refrigeration, and loans. An agricultural agent of Union Pacific in August, 1937, called attention to the possibility of dealers demanding payments for moving or for properties owned by them (FF 19, R. 351-2). The cash payments referred to in this finding were to be paid partly out of the sum of $80,000 in advance rental paid to the City by City Ice & Fuel Company under its long term lease for the cold storage facilities, and the balance from City warrants planned to be issued by the City against future revenues of the Public Levee property (FF 24, R. 355); the City and Union Pacific, in conjunction with DeOreo and other persons, have conspired to induce produce dealers to move their businesses from the produce district of Kansas City, Missouri, to the new market by means of offers of payments and gifts of free rents, reduced rents, free refrigeration, cash payments and rental credits, for the purpose of paying such produce dealers' cost of removal to the new market, the value of the furniture and fixtures in Kansas City, Missouri, and liability on unexpired leases in Kansas City, Missouri, but in some cases in excess of such costs, values or liabilities; that while the unsecured or inadequately secured loans were offered as aforesaid, they were never made by the Bank; that free advertising was paid for by Union Pacific; that the produce dealers have

agreed upon leases with the City for space at free rental and reduced rental, and many have agreed upon cash payments and rental credits; that the defendants have participated in and conspired together "in the plan in this paragraph mentioned and for the purpose of transferring the business of these defendants and of other produce dealers from the produce district in Kansas City, Missouri, to the Kansas City Food Terminal, and for the purpose of destroying the produce business in the Kansas City, Missouri, produce district" (FF 20, R. 352-4); that any payment or concession which has been offered to the Missouri dealers has been for the purpose of inducing them to move to the new market for the purpose of engaging in the business of shipping products (FF 23, R. 354-5).

11. Union Pacific proposed and urged City Ice & Fuel Company to make the advance rental payment to the City and to deposit $25,000 with Riverview State Bank as a guaranty against loss which that bank might sustain in making loans to produce dealers, all of which was a part of the plan stated *supra*, paragraph 9 (FF 24, R. 355). Union Pacific assisted in the preparation of the pleadings in *State ex rel. Parker* v. *Kansas City, supra,* and at the hearing the Supreme Court of Kansas announced through one of its attorneys, that Union Pacific, as the holder of the bonds, approved the use of the rental by the City for making the adjustments, and the Court should not interfere with the program (FF 25, R. 355-6); that Union Pacific as holder of the bonds has participated in the discussions with the produce dealers whereby cash payments were to be made by the City out of its revenue funds, and reduced rentals were to be made by it (FF 26, R. 356-7); Union Pacific offered to buy its ice requirements and those of its affiliate Pacific

Fruit Express Company from City Ice & Fuel Company as an inducement for it to become a tenant in the market (FF 27, R. 357); the compelling motive of Union Pacific for its activities was to secure additional produce traffic (FF 28, R. 357-8), to divert traffic from competing railroads (FF 29, R. 358), transfer the fresh fruit and vegetable center from Kansas City, Missouri, where it had been located for eighty years, to the Public Levee (FF 30, R. 358), and to avoid, in so far as possible, the necessity of sharing the traffic with competing carriers (FF 32, R. 359) through its operation of the team track yard (FF 31, R. 358; FF 33, R. 359).

12. Under the City's estimates of revenues and expenses, sufficient revenue will be received to pay off and cancel the entire bond issue within twenty-two years; during the first twenty-two years the revenues of the Public Levee will, after the payment of operating expenses, be subject to the lien of Union Pacific as the bondholder and during such period the City would get no profit, surplus, dividends or net return; the only benefit which the City would derive in such period would be an increase in its equity in the Public Levee property; City's estimates of revenues are based upon 90% occupancy as compared with 35% "at the present time"; the City's estimate of operating expenses is unduly low because it does not include loss due to depreciation and obsolescence not made good by current maintenance. The City will receive no immediate direct financial benefit from the market, but Union Pacific, because of the increase of its traffic, will derive an immediate benefit (FF 34, R. 359-60).

13. The removal of the produce business from Kansas City, Missouri, to Kansas City, Kansas, would bring about large losses to produce dealers and other property owners and to the commerce and trade at Kansas City,

Missouri, which would amount to irreparable damage if the cash payments and grants of free rental or reduced rental were made by the City (FF 35, R. 360-1). Because of the location of market solely on lines of Union Pacific it has an advantage over competing appellee railroads in the solicitation of competitive traffic "whereby diversion of traffic from competing appellee railroads would result in a loss to appellee Santa Fe of approximately $600,000 a year, appellee Missouri Pacific Railroad Company, $110,000 a year, appellee Burlington, $60,000 a year, and a substantial loss to appellee Rock Island (FF 36, R. 361-2).

14. The value of the market is fixed as follows:

Public Levee Land	$ 492,956.00
Cost of Market Reproduction New	3,106,435.00
Total Value	$3,599,391.00

Valuations of the separate buildings were fixed as follows:

Warehouse Space in Produce Buildings A-B-C-D	$2,144,113.00
Office Space in Produce Building D	134,817.00
Cold Storage Plant	865,778.00
Farmers' Market	554,860.00
	$3,699,568.00

(FF 38, R. 362-3).

15. The annual revenues of the market are as follows:

Warehouse Space in Buildings A-B-C-D	$ 126,360.00
Office Space in Produce Building D	21,000.00
Cold Storage Plant	38,497.00
Farmers' Market	24,664.00
	$ 210,521.00

The annual operating expenses estimated by the City, but to which the Court added depreciation, are as follows:

Buildings A-B-C-D	$ 47,658.00
Office Space in Building D	17,715.00
Cold Storage Plant	20,944.00
Farmers' Market	21,197.00
	$ 107,514.00

(FF 39, R. 364).

The net return to the City, after operating expenses and depreciation, would be:

Warehouse Space Buildings A-B-C-D	3.67%
Office Space Produce Building D	2.44%
Cold Storage Plant	2.03%
Farmers' Market	0.62%

(FF 40, R. 364); that such return, while low as compared to privately owned utilities, is nevertheless compensatory and, "in view of the purpose of the City to bring about industrial improvement and the incidental advantage to the City for that purpose and the return generally obtained from investments in utilities of like or similar nature, the present rental rates and the consequent return to the City are not so low that the use of the Food Terminal by tenants in interstate commerce at those

rentals will amount to a gift of any part of the value of the use of the Food Terminal to the tenant shippers" (FF 42, R. 365). The rentals of $150 per month per unit for produce buildings, $1.10 per square foot for office space and the rental for the Cold Storage Plant established by the City are intended to provide sufficient funds to amortize the principal and pay the interest on the revenue bonds purchased by Union Pacific and to compensate the City for the use of the facilities for the purpose to which they are dedicated (FF 41, R. 364-5).

16. No facilities similar to the new market in Kansas City, Kansas, exist in the neighborhood, and few exist in the United States. "One of the principal advantages resulting from such facilities * * * is the general benefit to the community and hence the return from such utilities must be considered, at least in part, in the light of their value to the community" (FF 43, R. 365).

CONCLUSIONS OF LAW BY THE COURT BELOW.

The Court rejected all conclusions of law separately offered by appellant City and by appellant Union Pacific and gave conclusions of law which in substance are:

1. The offering, agreeing upon, and giving the produce dealers cash payments, free rentals, rental credits and reduced rents constitutes a device for the offer of rebates, concessions, advantages, and discriminations in violation of the Interstate Commerce Act and the Elkins Act, whereby produce dealer shippers will be enabled to transport freight in interstate commerce at less than the published rates on file (C. L. 2, R. 366-7).

2. Under the facts found, the City and DeOreo and Fean have offered to give cash payments, free rentals of the character mentioned in 1, *supra*, which constitute rebates, concessions, advantages, and discriminations in violation of the Elkins Act and the Interstate Commerce Act, whereby a shipper will be enabled to transport freight by a common carrier at less than its published rates on file (C. L. 3, R. 367). Union Pacific has conspired with the City, DeOreo and Fean in agreeing upon or offering to give produce dealers concessions of the character mentioned in 1, *supra*, whereby the produce dealers will be enabled to transport freight in interstate commerce by a common carrier at less than the published rates on file, in violation of the Interstate Commerce Act and the Elkins Act (C. L. 4, R. 367-8), and the dealers have violated the law by soliciting cash payments and reduced rentals of such nature, in that they would transport freight by common carrier at less than the published rates on file (C. L. 5, R. 368). The course of transactions between all the defendants constitutes a subterfuge, scheme, plan and device, in

violation of both Acts, whereby a shipper will be enabled to transport freight at less than its published rates (C. L. 6, R. 369), and constitutes a conspiracy to violate both Acts (C. L. 7, R. 369).

3. That "by reason of the part played" by Union Pacific in the promotion, financing, construction and operation of the market, the City and Union Pacific were engaged in a joint venture whereby each is equally and jointly responsible for the offers, gifts and grants of said "rebates, concessions, advantages and discriminations" (C. L. 8, R. 370).

4. Union Pacific has "a first lien upon all rentals from said market and said food terminal" which it waived upon the $80,000 advance rentals paid by City Ice & Fuel Company by promoting and negotiating the plan of making cash payments to produce dealers of said $80,000, and by the waiver of said first lien by Union Pacific's counsel at the hearing of *State ex rel. Parker* v. *Kansas City, supra* (C. L. 12, R. 371).

5. The Supreme Court of Kansas *State ex rel. Parker* v. *Kansas City, supra,* had no jurisdiction over any "of the plaintiffs herein," of the subject matter or any part of the subject matter "or of any issue now before this Court." In that case it was "merely held that the City of Kansas City, Kansas, had not and would not violate any law of the State of Kansas by offering, agreeing upon or giving special inducements to produce dealers to move from Kansas City, Missouri, to the Kansas City Food Terminal," but the Supreme Court of Kansas had no jurisdiction to determine or attempt to determine whether the offering, agreeing upon or giving of special inducements to produce dealers violated the terms of the revenue bonds and the lien of Union Pacific upon the rentals of the market (C. L. 13, 371-2).

6. The acts of Union Pacific officers found were performed in its behalf to increase its freight traffic and not as agents for the City (C. L. 14, R. 372).

7. Lease of warehouse space and cold storage plant by a municipal corporation "associated with a rail carrier in a joint project or undertaking" to provide and lease such facilities to shippers at rentals which do not provide "a proper rate of return" upon the value of the facilities, is a violation of the Interstate Commerce Act and the Elkins Act (C. L. 15, R. 372-3), "but under the circumstances of this case the leasing of the facilities * * * at present rentals does not result in rebates and concessions in violation of either Act" (C. L. 16, R. 373).

8. The rate of return which must be received by a municipal corporation "associated with an interstate carrier in a joint project or undertaking" to lease facilities to shippers of freight must be sufficient to induce the municipal corporation to invest its funds in the enterprise for the purposes for which it is to be used exclusive of any purpose to aid the rail carrier (C. L. 17, R. 373), which rate of interest need not "under the circumstances of this case exceed the rate of interest earned from an investment in government bonds or other securities" (C. L. 18, R. 373-4). In determining the rate of return there must be deducted all expenses of operation, including an annual charge for depreciation which cannot be restored by current repairs and maintenance (C. L. 19, R. 374), and "the full value of the Public Levee land owned" by the City must be included in the value of the facilities "in determining rentals" when the land is leased in its proprietary capacity and as a participant with an interstate carrier in a joint project or undertaking, the City under such circumstances

having the same status as the interstate rail carrier with which it has become associated (C. L. 20, R. 374). "The fair value of the property will be used in determining the rate of return. The source of the invested capital, whether * * * borrowed or donated, will not affect the fair value" (C. L. 21, R. 375).

9. Whether free or inadequate rents have been given by Kansas City, Missouri, to tenants of its market is immaterial (C. L. 23, R. 375).

THE FINAL DECREE.

By its Final Decree the Court below enjoined appellant City, its officers, and Union Pacific, as follows:

1. From offering, granting, giving or assisting, joining or cooperating in cash payments, rental credits, free rents and reduced rents, unsecured or inadequately secured loans constituting concessions, or other valuable considerations to the produce dealers or other shippers to move to the new market or for leasing space or remaining as tenants in the market (R. 378).

2. From permitting the produce dealers or shippers to remain as tenants unless they—

(a) Shall pay rental for past occupancy under the provisions of the temporary restraining order which prescribed no rate of rental (R. 90) and preliminary injunction (R. 290-1) previously entered by the Court requiring rental payments at not less than $150 per month per unit for "substantially completed units" and for other units at the proportionate part of $150 per month which the 'percentage of actual utilization * * * bears to complete utilization * * *" and rentals for office space at not less than $1.10 per square foot per month for substantially completed space (R. 379); and

(b) Shall pay rental hereafter at the same rate charged all other shippers occupying similar facilities at the market which does not amount to a rebate or concession to any tenant and "which will yield a proper rate of return upon the full value of the market facilities as a whole, after making provision for all expenses of operation, including maintenance and depreciation" (R. 379).

3. DeOreo and Fean were enjoined from assisting the City or the Union Pacific in any of the acts which the City and the Union Pacific were prohibited from engaging in, and the produce dealers were enjoined from receiving cash payments, free or reduced rents, and from occupancy of the facilities, except on payment of the rental as above prescribed (R. 379-80).

4. The City was required to file with the Clerk of the Court each month for a period of twelve months after the entry of the Decree, or until the cause is finally determined on appeal, a written statement showing all rental payments made by tenants occupying the facilities at the market (R. 380-1).

5. Plaintiffs recovered their costs from the City and Union Pacific (R. 381).

6. In concluding, it was ordered that "permanent injunction shall remain in full force and effect until the further order of this Court" and "that future proper requests or petitions for modification of this decree may be made by motion in this cause" (R. 381).

IV.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED.

I.

The District Court erred in holding in its final decree, findings of fact and conclusions of law that the defendant City of Kansas City, Kansas, which is duly authorized by the Statutes of the State of Kansas to cooperate with the Public Works Administration of the United States in constructing a wholesale produce terminal on the Public Levee of said City, has entered into with or become engaged in a joint enterprise, joint adventure or any other similar relationship with the defendant Union Pacific Railroad Company in the construction and operation of said wholesale produce terminal (Argued as Points I, *infra* pp. 129-138, and II, *infra* pp. 138-159).

II.

The District Court erred in holding in its final decree, findings of fact and conclusions of law that defendant City of Kansas City, Kansas, in the operation and conduct of said Kansas City Food Terminal, although not engaged in transportation or in furnishing transportation facilities, has the status under and is subject to the Elkins Act and the Interstate Commerce Act the same as a common carrier by railroad (Argued as Points III, *infra* pp. 159-171, and VII, *infra* pp. 206-213).

III.

The District Court erred in holding in its final decree, findings of fact and conclusions of law that the activities of defendant Union Pacific Railroad Company, its officers and agents, in the promotion of the Kansas City Food Terminal, in assisting in obtaining the grant to said City from the Public Works Administration of the United States, in the purchase of the revenue bonds of defendant City, in tendering advice as to the planning or construction of such Food Terminal, in operating railroad trackage to serve the same and endeavoring to obtain tenants therefor, or otherwise in connection therewith, deprived defendant City of its ownership and lawful right and duty to operate, manage, control and lease said Food Terminal, or subjected said defendant City to joint obligation and liability with defendant Union Pacific Railroad Company and to the application of the Interstate Commerce Act and the Elkins Act (Argued as Points I, *infra* pp. 129-138; II, *infra* pp. 138-159; III, *infra* pp. 159-171; VI, *infra* pp. 190-206; VII, *infra* pp. 206-213, and XI, *infra* pp. 236-244).

IV.

The District Court erred in holding in its final decree, findings of fact and conclusions of law that defendant City could not lawfully lease facilities in the Kansas City Food Terminal, constructed by it with the aid of a grant from the Public Works Administration of the United States, upon the Public Levee, dedicated to the use of said City and required to be used for public purposes, without collecting from tenants to whom facilities in said Food Terminal were leased by it, rentals which would yield a

"proper rate of return," based upon a valuation of said Food Terminal which includes Public Levee land, together with the improvements constructed from funds provided by the City and the amount of said grant from the United States given to said City to relieve unemployment by the construction of useful public works (Argued as Points XI, *infra* pp. 236-244, and XII, *infra* pp. 244-262).

V.

The District Court erred in its final decree, findings of fact and conclusions of law in prescribing a "proper rate of return" at which the Kansas City Food Terminal can be leased by defendant City and the rates of rental which it may charge therefor, because the Court was without jurisdiction, power or authority to fix or prescribe rates of return and rates of rental, in that the promulgation of such rates of return and rates of rental is a legislative function which may not be exercised by the Court (Argued as Point XII, *infra* pp. 244-262).

VI.

The District Court erred in its final decree in enjoining defendant City from leasing the Kansas City Food Terminal except upon the basis of rentals which would produce a "proper rate of return" upon the District Court's value of such facilities after depreciation, when the undisputed evidence established and the Court by its Finding of Fact No. 42 and Conclusion of Law No. 16 determined that the rates of rental prescribed by defendant City long prior to the institution of this suit would provide such a return and would not constitute a rebate or concession to tenants of such facilities whereby a

common carrier would be caused to transport property at less than its published rates (Argued as Points VI, *infra* pp. 190-206, and XII, *infra* pp. 244-262).

VII.

The District Court erred in holding in its final decree, findings of fact and conclusions of law that defendant City is required to collect from tenants of the Food Terminal facilities such rates of rental as will yield a "proper rate of return" upon the Court's valuation of the Public Levee land dedicated to public use upon the appraised value of the facilities constructed thereon, notwithstanding 45% of the cost of such improvements was provided by a free grant from the United States through the Public Works Administration (no part of which grant was repayable by defendant City), pursuant to the provisions of the Emergency Relief Appropriation Act of 1935 (48 Stat. 195, 200, Chap. 90; 49 Stat. 115, 119, Chap. 48; Title 40 U. S. C. A., Sec. 403 *et seq.*) to relieve unemployment by constructing useful public works (Argued as Points XI, *infra* pp. 236-244, and XII, *infra* pp. 244-262.

VIII.

The District Court erred in holding in its final decree, findings of fact and conclusions of law that the effect of defendant City's constructing the Kansas City Food Terminal was to obtain traffic for defendant Union Pacific Railroad Company, when the undisputed evidence establishes that defendant City and the Public Works Administration of the United States required that the rail facilities of said Kansas City Food Terminal be made available to the cars of all railroads without discrimination and

that such rail facilities are so available and are so used in strict compliance with lawfully published tariffs of defendant Union Pacific Railroad Company and concurring tariffs of all the railroads entering greater Kansas City, including the plaintiff railroads (Argued as Point VI, *infra* pp. 190-206).

IX.

The District Court erred in holding in its final decree, findings of fact and conclusions of law that the defendant City of Kansas City, Kansas, is required to collect any rentals from tenants of the Food Terminal in so far as the provisions of the Elkins Act and the Interstate Commerce Act are concerned (Argued as Points III, *infra* pp. 159-171, VI, *infra* pp. 190-206, and XII, *infra* pp. 244-262).

X.

The District Court erred in holding in its Final Decree, Findings of Fact and Conclusions of Law that any offers of or solicitations for cash payments, free rentals or reduced rentals to produce dealers were made by or solicited from defendant Union Pacific Railroad Company, either directly or indirectly (Argued as Point VIII, *infra* pp. 213-217).

XI.

The District Court erred in holding in its final decree, findings of fact and conclusions of law that defendant Union Pacific Railroad Company, as holder of the revenue bonds issued by defendant City, had any lien upon or claim to any portion of such Public Levee revenues which defendant City intended to use in making adjustments

with produce dealers, and that defendant Union Pacific Rialroad Company waived such lien or claim (Argued as Points IV, *infra* pp. 171-180, and V, *infra* pp. 180-190).

XII.

The District Court erred in holding in its final decree, findings of fact and conclusions of law that defendant Union Pacific Railroad Company had waived any of its rights as the owner and holder of the revenue bonds of the defendant City by reason of any participation in the submission to the Supreme Court of Kansas of the *quo warranto* proceedings (*State ex rel. Parker* v. *City of Kansas City,* 151 Kan. 2, 98 P. [2d] 101), when the District Court, by its finding of fact No. 42 and conclusion of law No. 16 and by its memorandum opinion upon Final Hearing, determined that the rates of rental prescribed by defendant City prior to the institution of said proceeding, were sufficient to enable said City to pay all of its expenses in connection with said Food Terminal, the expenses of operation and maintenance, including the proposed adjustments to produce dealers, the interest upon and the principal of the revenue bonds of said City held and owned by the defendant Union Pacific Railroad Company. (Argued as Points IV, *infra* pp. 171-180, and V, *infra* pp. 180-190.)

XIII.

The District Court erred in holding in its final decree, findings of fact and conclusions of law that it had jurisdiction, power and authority to prescribe rates of rental at which defendant City of Kansas City, Kansas, might rent said market facilities in said Kansas City

Food Terminal, or to fix the valuation thereof or prescribe rates of return to be derived therefrom. (Argued as Points VI, *infra* pp. 190-206; XI, *infra* pp. 236-244, and XII, *infra* pp. 244-262.)

XIV.

The District Court erred in holding in its final decree, findings of fact and conclusions of law that defendant City was not authorized under Sections 13-1242 and 13-1243, G. S. Kan. 1935, to fix rates of rental in such amounts as its governing body may determine, subject only to the limitations expressed in said Statutes, and to apply such amounts of revenues derived from the Public Levee as the governing body of defendant City might in its discretion determine to be proper for the payment of damages sustained by produce dealers moving to said Kansas City Food Terminal; and that the District Court had power, jurisdiction and authority in this proceeding to impair, destroy and regulate the exercise of the power conferred upon defendant City by said Statutes. (Argued as Points VI, *infra* pp. 190-206; XI, *infra* pp. 236-244, and XII, *infra* pp. 244-262.)

XV.

The District Court erred in its final decree, findings of fact and conclusions of law in refusing to follow and apply Sections 13-1242 and 13-1243, General Statutes of Kansas, 1935, as construed by the Supreme Court of Kansas in the case of *State ex rel. Parker* v. *City of Kansas City, Kansas,* 151 Kan. 2, 98-P. (2d) 101, that defendant City of Kansas City, Kansas, is authorized to lease said Food Terminal facilities for such rental and upon such conditions as in the judgment of its governing

body will be to the best interest of said City, provided that the rents so fixed by it shall be sufficient to pay all expenses of the City connected therewith and the principal and interest of all revenue bonds. (Argued as Points I, *infra* pp. 129-138; II, *infra* pp. 138-159; III, *infra* pp. 138-159; VII, *infra* pp. 206-213; XI, *infra* pp. 236-244, and XII, *infra* pp. 244-233.)

XVI.

The District Court erred in holding in its final decree, findings of fact and conclusions of law that defendant Union Pacific Railroad Company as a common carrier by railroad would be caused to transport freight at less than its duly published tariffs, or to commit discriminations forbidden by the Interstate Commerce Act. (Argued as Points VIII, *infra* pp. 213-217; IX, *infra* pp. 217-233, and X, *infra* pp. 233-236.)

XVII.

The District Court erred in holding in its final decree, findings of fact and conclusions of law that by reason of any of the facts shown in evidence a common carrier by railroad would be caused to transport property at less than its published rates or to commit discriminations forbidden by law, and such findings, conclusions and decree are contrary to and inconsistent with finding of fact No. 42 and conclusion of law No. 16 by which the District Court found and determined that the basis of rentals prescribed by the defendant City for the use of its Food Terminal facilities was such that use of the Food Terminal facilities at such rentals would not amount to a gift of any part of the value of the use thereof to any tenant shipper. (Argued as Points VI, *infra* pp. 190-206, and VIII, *infra* pp. 213-217.)

XVIII.

The District Court erred in holding in its final decree, findings of fact and conclusions of law that defendant Union Pacific Railroad Company, a common carrier by railroad, authorized by law to compete with other common carriers, may not, for the purpose of increasing its traffic, lawfully encourage a municipal corporation to engage in the construction of a wholesale produce market in pursuance of power conferred upon said City by the Statutes of the State, and that it may not assist said City in the planning and promotion of said market and may not purchase revenue bonds of said City, and may not assist said City in leasing such facilities in compliance with the governing Statutes of the State, at rates of rental sufficient in amount to pay all of said City's expenses in connection therewith, the interest upon and principal of such revenue bonds, and to earn a substantial surplus in excess thereof. (Argued as Points VIII, *infra* pp. 213-217; IX, *infra* pp. 217-233; X, *infra* pp. 233-236, and XI, *infra* pp. 236-244.)

XIX.

The District Court erred in holding in its final decree, findings of fact and conclusions of law that a conspiracy existed between the defendants to violate the Elkins Act or the Interstate Commerce Act. (Argued as Point X, *infra* pp. 233-236.)

XX.

The District Court erred in finding and concluding that any plan, scheme or device for rebates or concessions to shippers in violation of either the Interstate Commerce Act or the Elkins Act was engaged in by the defendant City of Kansas City, Kansas, and the defendant Union

Pacific Railroad Company, and said findings and conclusions are contrary to and in conflict with finding of fact No. 42 and conclusion of law No. 16, and the Memorandum Opinion on Final Hearing by which the District Court determined that the basis of rentals established by defendant City was such that use of the Food Terminal facilities at such rentals would not amount to a gift of any part of the value of the use of the Food Terminal to any tenant shipper. (Argued as Point IX, *infra* pp. 217-233.)

XXI.

The District Court erred in ordering that the City of Kansas City, Missouri; the Atchison, Topeka & Santa Fe Railway Company; Chicago, Burlington & Quincy Railroad Company; Missouri Pacific Railroad Company and Guy A. Thompson, as its Trustee; and Chicago, Rock Island & Pacific Railway Company and Frank O. Lowden, James E. Gorman and Joseph B. Fleming, as its Trustees, be made parties plaintiff, and in denying the motion of defendant Union Pacific Railroad Company to vacate said order that they become parties plaintiff. (Argued as Points XI, *infra* pp. 236-244, and XII, *infra* pp. 244-262.)

XXII.

The District Court erred in not holding that under the law and the evidence a decree must be entered dismissing the Complaint with prejudice. (Argued as Points I to XII, inclusive, *infra* pp. 129-262.)

XXIII.

The District Court erred in giving its findings of fact numbered 8 to 20, both inclusive, 22 to 41, both inclusive, and 44, and its conclusions of law numbered 1 to 25, both inclusive. (Argued as Points I to XII, inclusive, *infra* pp. 129-262.)

XXIV.

The District Court erred in overruling several objections interposed by defendant City of Kansas City, Kansas, hereinafter set forth, to the introduction of plaintiffs' Exhibits numbered 2 to 47, both inclusive, consisting of correspondence, telegrams, memoranda and records taken from the files of defendant Union Pacific Railroad Company. (Argued as Point X, *infra* pp. 233-236.)

XXV.

The District Court erred in overruling objections of the defendant City of Kansas City, Kansas, and its defendant officers to the admission of the testimony of plaintiffs' witnesses Hopkins, Manly, Brown, Boice, Gasaway and Hansbury, relating to the value of the Public Levee land, together with the buildings and improvements thereon situated (Argued as Point XII, *infra* pp. 244-262).

V.

SUMMARY OF ARGUMENT.

The Court below in its final decree (R. 378), restrained the City in the exercise of powers expressly granted to it by the statutes of the State of Kansas in leasing its public market, constructed by it with public funds, on its Public Levee, and prohibited occupancy thereof except upon terms prescribed by the Court despite an express ruling by the Court below that it possessed no power to fix future rentals and that the present schedule of rentals resulted in no violation of either the Interstate Commerce Act or the Elkins Act.

This was accomplished by a suit instituted by the United States at the request of the Interstate Commerce Commission under Section 3 of the Elkins Act (Title 49, Section 43, U. S. C. A.)[1] which authorized equitable relief to the United States, only upon proof that any common carrier is (1) "engaged in the carriage of * * * freight traffic * * * at less than the published rates on file"; or (2) is "committing any discriminations forbidden by law."

It was affirmatively alleged in the Complaint (R. 16) admitted by the Answers of appellants (R. 118; 137) and shown by the evidence that the City proposed to make settlement with its revenue funds with tenants for losses, sustained in moving to the City's new market and that the City's right to make such settlements had been upheld by the Supreme Court of Kansas.

Both in the complaint and in contentions made in the Court below appellees sought to avoid the application of this settled law of the state and give color to the claim

[1] Appendix, p. 267.

that funds of Union Pacific were to be used despite uncontroverted evidence to the contrary, by asserting Union Pacific would be caused to transport freight at less than its tariff rates, upon the sole basis of inferences:

(1) The City and Union Pacific were joint venturers in the City's public market;

(2) Union Pacific as the holder of revenue bonds had a first lien on all of the Public Levee revenues intended to be used by the City and had waived such lien;

(3) A conspiracy existed between the City, its officers, Union Pacific, and defendant produce dealers, to bring about the result forbidden by both Acts; and

(4) That the course of conduct between the defendants in the Court below constituted a plan, scheme, device or subterfuge to bring about a violation of both Acts.

It will be shown that there is no basis for the decree of the Court below, because:

I.

The ruling of the Court below that a joint adventure existed between the appellants in the operation and management of the City's public market ignores the law of Kansas which was controlling on the Court below as to the creation of such joint venture and is contrary to the undisputed evidence and wholly inconsistent with its findings (*infra* pp. 129-138).

II.

The Court below erroneously held a joint venture had been created although no contract creating such a relationship was shown to exist and despite a contrary intent

of the parties shown by written contracts wholly inconsistent with the Court's own findings of fact (*infra* pp. 138-159).

III.

The findings of the Court below and the undisputed evidence establish that the appellant City is not a common carrier or engaged in any service of transportation and is not subject to the Interstate Commerce Act (*infra* pp. 159-171).

IV.

In ruling that appellant Union Pacific had a first lien on all the rentals derived by appellant City from its public market the Court below erroneously failed to apply and follow controlling statutes and law of the state of Kansas and ignored its findings of fact which disclose there is no basis for its ruling (*infra* pp. 171-180).

V.

The ruling of the Court below that Union Pacific waived its lien upon the revenues which the City proposed to use in settlement with its tenants rejects controlling law of the state of Kansas and is contrary to the evidence (*infra* pp. 180-190).

VI.

The offer by the City to make payment of the proposed adjustments out of its Public Levee revenues did not accomplish the result forbidden by either the Interstate Commerce Act or the Elkins Act because a com-

mon carrier would not thereby be caused to transport freight at less than its duly published tariffs (*infra* pp. 190-206).

VII.

The undisputed evidence shows that throughout "the whole course of the transactions embraced in the Findings of Fact" the City had and exercised complete control of every phase of the development of its public market and was in no manner subject to the control of Union Pacific (*infra* pp. 206-213).

VIII.

There was no basis for the decree of the Court below that Union Pacific had violated the Interstate Commerce Act or the Elkins Act (*infra* pp. 213-217).

IX.

The record affords no support for the finding of the Court below that any scheme, device, or subterfuge to violate either the Interstate Commerce Act or the Elkins Act was entered into by appellants (*infra* pp. 217-233).

X.

The City, the Union Pacific and the other defendants in the Court below did not enter into any conspiracy to violate the Interstate Commerce Act or the Elkins Act because the objective sought to be attained being lawful, any understanding or cooperation which might have been given to effectuate such lawful purpose was not a violation of either Act (*infra* pp. 233-236).

XI.

The Court below erred in permitting alleged losses to appellee railroads of traffic revenue upon "competitive traffic" to be made a controlling element in the conduct and disposition of the case (*infra* pp. 236-244).

XII.

The Court below was without power to restrain the appellant City from the exercise of the authority conferred upon it by the statutes of the state or to compel it to establish rates of rental for its market facilities which would yield a rate of return prescribed by the Court upon the Court's valuation of the market facilities, including the Public Levee land and improvements constructed with Federal funds donated by the Public Works Administration of the United States (*infra* pp. 244-262).

VI.

ARGUMENT.

I.

The ruling of the Court below that a joint adventure existed between the appellants in the operation and management of the City's public market ignores the law of Kansas which was controlling on the Court below as to the creation of such joint venture and is contrary to the undisputed evidence and wholly inconsistent with its findings.[1]

The first of appellees' contentions by which they sought to avoid fatal consequences of applying *State ex rel. Parker* v. *Kansas City* (*supra*) as to statutory powers of the City was that a joint venture existed between appellants whereby Union Pacific was jointly and equally responsible with the City for the proposed payments to the latter's tenants. The Court below in its conclusion of law No. 8 (R. 378) and reflected in conclusions of law Nos. 15, 16, 17, 18, 19, 20 and 21 (R. 372-375) held a joint venture existed despite the absence of any contract creating the relationship, and of other elements held essential by the Kansas Courts. This erroneous premise was the basis upon which the Court below ignored the express statutory authority of the City to establish rates of rental for its market facilities and restrained the City from leasing its public market, except upon the basis prescribed by the Court.

The specific authority of fact and law cited by the Court below on the existence of a joint venture, joint undertaking, joint enterprise, and joint project, discloses that the law of Kansas concerning the creation of such

[1]Assignments I, III; R. 383-4.

a joint relationship as would subject the appellants to the alleged joint and equal responsibility was wholly ignored.

It is not open to question that the character of a relationship entered into by a municipal subdivision of the state of Kansas, by contracts which it is specifically authorized to enter into by the statutes of the state, by the sale of its municipal securities pursuant to the authority of such statutes, or by its conduct in the development of its publicly owned and dedicated property pursuant to express statutory authority, must all be determined by the law of the state as concerning its statutes and as determined by its highest court.

It is equally certain that in any proceeding in a Federal Court in which it is sought to imply the existence of such a relationship on the part of such a municipal corporation as amounts to a surrender to another of rights, interests, and authority committed by the statutes of the state to a municipal corporation thereof, it is the duty of the Court to follow and apply the law of the state as prescribed by its statutes and as determined by its highest court. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

In *Railroad Commission of California* v. *Los Angeles Ry. Corp.*, 280 U. S. 145, this Court had for decision the question of the power of a city to establish public utility rates under a franchise agreement. The Court said, l. c. 152:

> "This court is bound by the decisions of the highest courts of the States as to the powers of their municipalities."

To the same effect are:

Lauf v. *E. G. Shinner & Co.*, 303 U. S. 323, 327-8.
Denney v. *Pacific Telephone & Teleg. Co.*, 276 U. S. 97.
Old Colony Trust Co. v. *Omaha*, 230 U. S. 100, 116.
Georgia Railway Co. v. *Town of Decatur*, 262 U. S. 432, 438.
Texarkana v. *Arkansas Louisiana Gas Co.*, 306 U. S. 188, 198.

The joint and equal responsibility of Union Pacific resulting from a joint venture found by the Court below cannot be used to avoid the decision in *State ex rel. Parker* v. *Kansas City, supra*, if under the law of Kansas such a relationship did not exist. It will be shown that no joint venture or joint relationship creating any joint interest between the City and Union Pacific in the funds or property of the market or any joint liability or responsibility between them with respect thereto existed under the law of Kansas which the Court below refused to accept as controlling.

It Is the Settled Law of Kansas that a Joint Venture Can Be Created Only by Contract Entered Into Between the Parties Thereto.

The character of the relationship of joint adventure in Kansas is thus described in *Curtis* v. *Hanna*, 143 Kan. 186, 53 Pac. (2d) 795, l. c. 797:

> "To a considerable extent, a joint adventure is a partnership not general in its field of operation and length of duration, but limited to a particular enterprise or venture."

In *A. C. Houston Lumber Co.* v. *Marshall*, 109 Kan. 172, 197 Pac. 861, the Court quoted the following rule with approval:

"The subject of joint adventures is of comparatively modern origin. It was unknown at common law, being regarded as within the principles governing partnerships. While some courts hold that a joint adventure is not identical with a partnership, it is regarded as of similar nature, and governed by the same rules of law."

In *A. C. Houston Lumber Co.* v. *Marshall, supra,* the Court said (l. c. 861):

"To have created a partnership, it was necessary that each of the parties should have contracted with all the others. A partnership contract could have been express or implied, *but there must have been a contract. A joint adventure could not have been created except in the same way.*" (Emphasis ours.)

In *Wade* v. *Hornaday,* 92 Kan. 293, 140 Pac. 870, the Court said:

"It has also been repeatedly declared that *a man cannot be made a partner against his will, by accident, or by the conduct of others, for the reason that partnership is a matter of contract. * * * Nor will it arise by operation of law. The courts will no more create such a contract against the will of a party than they will contracts of any other character.*" (Emphasis ours.)

In *Curtis* v. *Hanna, supra,* it was held (l. c. 796-7):

"Whether a partnership or joint adventure is relied on, the best evidence consists of the agreement or contract between the parties, but it may be proved by any competent evidence, the burden being on the party asserting the relation to exist. *Lacking a formal expression, the agreement or contract may be found in the mutual acts and conduct of the parties.*" (Emphasis ours.)

In *Rider* v. *Hammell*, 63 Kan. 733, 66 Pac. 1026, the Court held:

"Whether a written agreement between two or more persons, which is plain and unambiguous, creates a partnership *inter se*, is a question of law."

In the opinion the Court said, l. c. 1027:

"In determining whether a certain instrument operates to create a partnership *inter se, the intention of the parties is the important question. If it was not so intended, the court will not so declare.*" (Emphasis ours.)

An Agreement Which Does Not Include the Essential Elements of Community of Interest in the Property, in Its Management, and in the Profits and Losses Will Not Establish a Joint Liability.

In *Jones* v. *Davies*, 60 Kan. 309, 56 Pac. 484, several parties united in the purchase of real estate, not as a permanent investment but as a speculation, with a view of sale for profit. Each was to pay an allotted portion of the purchase price and expenses and to receive an equivalent portion of the profits. Suit was brought to recover the purchase price. Davies, who had acquired the interest of one of the original parties, denied liability. In the opinion the Court said, l. c. 485:

"The question is presented here whether the joint adventure of these parties amounted to a partnership, and whether the defendant is liable as a partner. * * * all of the essential elements of a partnership were present in this business undertaking. The property was purchased for speculation and profit, and the purchasers who associated themselves together as a unit were the joint owners of the same. No one of them owned any particular part of the

> lots exclusive of the others, but each had an interest in the whole in common with all the others. * * * *The agreement was that they were to divide the expenses and share the profits to be derived from trading in this property.* * * * *There was a community of ownership of the property, community of power in the management of the business, and community of interest in the profits and losses arising from the undertaking.*" (Emphasis ours).

Rider v. *Hammell, supra,* was a case in which Rider, by written agreement, rented to McCarty a drilling machine and equipment, to be used in drilling wells, and agreed to furnish new cables when needed and pay one-half the cost of certain tools which might be lost in operation. McCarty was to operate the machine at his own expense and pay Rider 25 cents per foot for all wells completed. Rider was to share equally in any right of development of wells drilled by McCarty in case any should be worth operating. The contract was to terminate on 30 days' notice. In a suit brought by one who had furnished coal to McCarty with knowledge of the terms of the agreement, plaintiff sought to recover against Rider as a partner. In the opinion the Court said:

> "Does this agreement constitute a partnership between these parties as to themselves? We do not think it does. In the first place, it does not provide that they shall have a joint interest in the business or the profits. Rider was not to receive any of the profits. * * * This agreement was not a combination of the property, labor, and skill in an enterprise or business as principals. *The existence of a partnership implies the relation of principal and agent.* * * * Rider was not a principal. He had no control or supervision over the contracts made, or of the work to be performed thereunder. McCarty might

regulate his own charges and negotiate for his pay at any time and in any manner he desired, without consulting Rider. * * * The law is now well settled that where a person loans or advances money or goods to another, to be invested in some business or enterprise, the lender to share in the profits as or in lieu of interest on, or in repayment of, such loans or advances, it does not constitute a partnership. * * * In determining whether a certain instrument operates to create a partnership *inter se*, the *intention of the parties is the important question. If it was not so intended, the court will not so declare.*" (Emphasis ours.)

In *Sutton* v. *Schaff*, 104 Kan. 482, 178 Pac. 418, Sutton brought suit against a carrier for the wrongful delivery of cars of hay shipped by the plaintiff to himself under an order bill of lading. By agreement between Sutton and a company engaged in the business of handling hay, Sutton was to buy and pay for hay out of his own funds; the hay was to be shipped to Kansas City, consigned to the plaintiff, with original bill of lading and arrival draft for purchase price of the hay attached. The hay company was to pay the draft out of its funds, sell the hay, deduct expenses, and divide profits and losses equally with Sutton. The defendant carrier asserted that the agreement constituted a partnership and the hay, having been delivered to the hay company, was delivered to the partnership and the plaintiff could not recover. From the opinion of the Court the following is quoted (l. c. 418):

"The defendant argues that, because there was a division of the profits and losses arising out of these transactions, the plaintiff and the company were partners. Community of interest in, or a division of, profits and losses, is one of the principal tests by which to determine whether parties are partners;

but it is not a conclusive test. Community of interest in the property devoted to the business and community of control over that property are other and important tests. (Citing authorities).

"The defendant cites *Railway Co.* v. *Hucklebridge*, 62 Kan. 506, 64 Pac. 58.

"In that case, there was a community of interest at the inception of the business; one had contributed money and the other labor in purchasing the cattle and each then had an interest therein. There was more than sharing profits and losses. Sharing profits and losses and community of interest in the property has appeared in the following cases in which this court has held that there was a partnership * * * (Citing its previous decisions).

* * * * * * * *

"In *Shepard* v. *Pratt*, 16 Kan. 209; *Beard* v. *Rowland*, 71 Kan. 873, 81 Pac. 188; *Weiland* v. *Sell*, 83 Kan. 229, 109 Pac. 771; *Wade* v. *Hornaday*, 92 Kan. 293, 140 Pac. 870; and *Tate* v. *Crooks*, 68 Pac. 74 (not printed in the official report)—this court held that partnerships did not exist. In Weiland v. Sell the profits and losses were shared. In the others of these cases there was a division of profits, but there was no community of interest in the property in any of them. * * *.

"Another, and important, test is the intention of the parties to the contract." (Citing cases.)

It Is Essential that the Contract of the Parties, Whether Express or Implied, Provide for a Sharing of Both Profits and Losses.

In *Grantham* v. *Conner*, 97 Kan. 150, 154 Pac. 246, the Court said:

"He (the plaintiff) insists that he is entitled to an interest in the land on the theory that a partnership relation was formed by the agreement. * * * That relation does not exist between the parties because the agreement did not provide for a com

munity of profits and losses in the business enterprise. Persons may enter a partnership relation by uniting to place their money, effects, labor, or skill, or some of them, in a business enterprise, but it is essential that each member shall subject himself to partnership duties and liabilities, and that there shall be a community of interests in the profits and losses. * * * *Here there was no agreement that Grantham should bear any of the expenses or share in any of the losses that might result from the enterprise.*" (Emphasis ours).

In *Moore* v. *Thompson*, 105 Kan. 492, 184 Pac. 980, the Court said (l. c. 981):

"One of the important tests in determining the existence of a partnership is the sharing of profits and losses of the enterprise."

To the same effect are:

Rider v. *Hammell*, *supra*.
Sutton v. *Schaff*, *supra*.
Atchison, Topeka & Santa Fe v. *Hucklebridge*, 62 Kan. 506, 64 Pac. 58.

That an agreement, not intended by the parties thereto to create such a liability, will not be construed to establish the same, even as to third persons, except upon the basis of estoppel, is also clear. In *Rider* v. *Hammell*, *supra*, the Court said:

"Neither will it constitute a partnership as to third persons unless the acts of the parties in furtherance of the agreement between themselves amount to such a holding of themselves out as partners as that third persons are misled into a reasonable belief that a partnership exists in fact."

In *Clark* v. *Crouse*, 130 Kan. 177, 285 Pac. 577, 579, the Court said:

> "The general rule is that a person is not liable for a partnership obligation unless he is, in fact, a partner. * * * If he holds himself out as a partner he may be held liable as far as third parties are concerned, although he may not, in fact, be a partner. *This rule is based on the ground of estoppel, but is not to be applied when the third party has no knowledge of the holding out and who was not misled by the appearance produced.*" (Emphasis ours).

It is clear, therefore, that under the settled law of Kansas the burden rested upon the appellees in the Court below to establish:

(1) An agreement between the appellants to enter into the alleged joint venture or partnership relation.

(2) The parties by their agreement intended to and did create a community of interest in the property involved, a community of interest in the profits and losses of the enterprise, and a community of power in the management and control thereof.

In the argument following, we will show that no contract, express or implied, embodying either of these elements, was entered into between the City and Union Pacific. It will also be shown that the exact relationship intended between the parties is set forth in written contracts which established that a joint adventure or joint liability was not intended.

Under the settled law of Kansas, where the exact relationship intended between parties is shown by the express terms of written contracts, no unintended joint relationship or liability may be implied from the acts or conduct of the parties, without proof that a third

party has acted to its prejudice from reliance upon conduct of the parties, evidencing such unintended relationship, and estopping them to deny its existence.

II.

The Court below erroneously held a joint venture had been created, although no contract creating such a relationship was shown to exist and despite a contrary intent of the parties shown by written contracts wholly inconsistent with the Court's own findings of fact.[1]

The existence of a joint venture with its legal consequences cannot be implied from any written agreement entered into between the City and Union Pacific.

The Relationship Between the Parties, Established by the Lease of the Team Track Yard.

The terms of the written team track lease between the City and Union Pacific (R. 2165-73), with respect to rail service to the market were specifically found by the Court below to have established no joint relationship between the parties yet it implied the relationship in derogation of the lease and of the intention plainly expressed by both parties therein.

The following findings of fact of the District Court flatly contradict the existence of a joint adventure as ruled by it. The Court found:

> "That defendant City of Kansas City, Kansas, is, and since its opening has been, operating and managing the produce market and other facilities forming a part of said terminal" (FF 17, R. 350).

[1]Assignments I, R. 383; III, R. 383-4; XV, R. 387.

As to Union Pacific the Court found:

> "The defendant Union Pacific is now, and since its opening has been, operating the team track yard and other railroad facilities forming part of said terminal" (FF 17, R. 350).

With respect to ownership, the Court below found that the City owns and paid for the market facilities and terminal trackage south of Jersey Creek; that the Union Pacific owns and paid for the team track yard (FF 16, R. 349-50).

The Court below further found that it was intended that:

> "All railroad service in connection with such terminal, including the operation of the yard tracks, drill tracks, spur track, and side tracks forming a part of the facilities of said terminal, should be operated exclusively by the Union Pacific" (FF 31, R. 358).

There is neither evidence nor finding of fact by the Court below that any contract, express or implied, was entered into between the City and Union Pacific to share profits and losses in connection with the market, or otherwise.

The written contract between the City and the Union Pacific relative to the team track yard, offered in evidence by the appellees, is, in plain and unequivocal terms, an agreement evidencing the intent of the parties thereto that the Union Pacific should lease from the City, at a fixed annual rental of $10,760 per year for a minimum term of 30 years, a portion of the Public Levee; that Union Pacific should fill the ground, construct, own and operate the team track yard. It recited that the City should construct and own the industry or house tracks serving the four

produce buildings, that Union Pacific should operate those tracks and perform all rail transportation service intended by either party to the contract with respect to that portion of the City's market facilities. It definitely required that the rail facilities should be open to the cars of all railroads entering Kansas City, and Union Pacific agreed that it would switch with expedition and without discrimination, at rates provided in lawfully published tariffs, all cars destined to or originating on the trackage therein provided for. The City agreed to indemnify Union Pacific against liability for damage by fire to the market buildings and for injury or damage to its employees or property from the negligence of the City (R. 2165-73).

The relationship between the parties, evidenced by this written agreement, is that of lessor and lessee. There is no evidence that any other or different relationship was ever intended by either party. The specific provision that Union Pacific's transportation service should be performed at rates provided in lawfully published tariffs clearly shows the intent of both parties that no part of such charges should be received by the City and that Union Pacific should receive and retain the entire amount thereof. The obligations of Union Pacific to the City were in no way dependent upon the operation of the market. No right is conferred upon the City to share in any profits that might be realized by Union Pacific in the operation of the team track yard. Neither does the lease confer any right upon Union Pacific to share in profits which might be realized by the City in the operation of its market. The success or failure of the market does not affect the obligation of Union Pacific under its lease any more than the success or failure of the team track yard operation would result in an operat-

ing profit or loss to the City. The rights of the parties are in opposition to the creation of any joint relationship under the lease in question.

The Relationship Between the Parties Resulting from Union Pacific's Purchase of the City's Revenue Bonds.

The Court below by its finding of fact No. 34 (R. 359-60) determined that under the City's estimates of revenues and expenses of the Public Levee property during the term of the bonds, sufficient revenue would be produced to pay all the bonds in 22 years and during that period all the rentals and other income of the Public Levee property will "after the payment of operating expenses" be subject to the lien of Union Pacific as the bondholder.

The bonds, purchased by the Union Pacific, issued by the City under the authority of its Ordinance No. 30206 (Pl. Ex. 62-B, R. 2557; offered, R. 474) as amended by Ordinance No. 30239 (Pl. Ex. 62-B, R. 474; offered, R. 2591) contained recitals that they were issued in full compliance with the provisions of Sections 13-1238—13-1245, G. S. Kan., 1935, as amended,[1] and in conformity with Ordinance No. 30206. By their terms the City agreed to pay the principal amount of said bonds serially over a period of 30 years with interest at 4% per annum, solely from the fees charged and rental received for the use of the Public Levee and facilities connected therewith. The provisions of Section 13-1242, G. S. Kan., 1935, are:

> "Provision shall be made by the governing body of such city for the payment of said bonds, by fixing rates and charges for the use of and the services to be rendered by such property and facilities, which rates and charges so fixed shall be sufficient to pay all expenses of the city in connection therewith and

[1]Appendix pp. 272-274.

> cover the cost of operation and repairs, pay all interest charges upon all indebtedness created for the purpose of improving, constructing, reconstructing, repairing or improving of such public levee and the improvements and facilities thereon for which such revenue bonds were issued to so improve, construct, reconstruct or repair and to provide a sinking fund sufficient to pay off such indebtedness at maturity,"

and the City covenants and agrees to comply therewith. By Section 10 of the bond ordinance (R. 2571-2), it is provided that the bonds shall constitute a first lien and claim on the revenues of the Public Levee, "subject only to the payment of all sums required for the reasonable and proper operation, maintenance, and repair of said Public Levee," and Section 13 (R. 2574-5), the City agrees that it will maintain in good repair and working condition the Public Levee of said City and will operate the same in an efficient manner and at reasonable cost so long as any of the bonds remain outstanding. The ordinance provides (R. 2572-3) that so long as any of the bonds remain outstanding all revenues derived by the City from the operation of its Public Levee and "not required to pay the expense of operation, maintenance, and repair of said Public Levee" or for serial maturities would be used to call additional bonds for payment. Section 13-1243 G. S. Kan., 1935, made a part of the City's agreement with the bondholder by specific reference provides:

> "*The governing body of such city is hereby empowered and authorized* to enter into an agreement in writing with any person, firm or corporation *to erect and construct on its public levee, improvements and facilities authorized and mentioned in this act and lease the same* for a term of not to exceed ninety-nine years *for such rental and upon such conditions*

as in the judgment of said governing body will be to the best interest of such city, provided the rent fixed by any such agreement and lease shall be sufficient to liquidate and pay *all expenses of the city connected therewith and the principal and interest of all revenue bonds* issued or to be issued to pay the full cost of such improvements and facilities so leased." (Emphasis ours.)

No extended analysis of the Kansas statutes to determine whether the bonds and the ordinances under which they were issued comply with applicable statutes is necessary because the question has been decided by the State Supreme Court. In *State ex rel. Beck* v. *Kansas City,* 149 Kan. 252, 86 Pac. (2d) 476, a proceeding brought at the instance of the City to determine the validity of the ordinance and bonds, it was held the covenants and agreements contained in the questioned bond issue are in conformity with the bond ordinance authorizing their issue, and the ordinances are authorized by the pertinent statutes; "that the City and its officials are proceeding in strict accord with the authority conferred by the statute."

The clear and unequivocal relationship thereby intended and established between the City and Union Pacific is that of debtor and creditor and not of joint adventurer. It was plainly required that the City should construct, own, and operate the proposed improvements. The governing body of the City, and it alone, was authorized to determine upon and pay out of the revenues of the Levee, the expenses of reasonable and proper operation, maintenance, and repair. The City was required to lease the facilities of the Levee upon such terms and conditions as in its discretion were to the best interests of the City at rates of rental prescribed by it, but adequate to meet all expenses and retire the bonds. Out of the revenues, not

merely of the market, but of the entire Public Levee, the City was required to repay to the bondholder the principal amount of the bonds with interest of 4%. The bondholder's right of supervision reserved in its proposal of purchase was optional and specifically limited to *construction* of the facilities.

Manifestly, the repayment to the Union Pacific of the sum borrowed from it, with interest, did not constitute a share in the profits of the market enterprise, as the Court below plainly found in its finding of fact No. 34 (R. 359-60). Beyond this repayment, the purchase of the bonds entitled Union Pacific to nothing. The bonds were negotiable, payable to bearer and by their plain terms and the ordinance under which they were issued the City intended and agreed to no relationship with Union Pacific which it had not intended to agree upon with any other holder of the bonds. To contend that a joint venture resulted is to distort the plain meaning of the terms of the bonds and to imply relationships rejected by the bonds themselves.

The Written Contracts of the Parties Demonstrate that No Joint Interest in or Control Over the Property and No Sharing of Profits or Losses Was Intended or Agreed Upon.

Together these two written contracts definitely evidence the intent and agreement of the appellant City and its officers and of the appellant Union Pacific that no joint venture should be created, that the City should have no interest in, control over, or share in the profits or losses of the operations of the Union Pacific under its team track lease, and that the Union Pacific should have no interest in or control over the portion of the Public Levee devoted to the market facilities or any share in the profits or losses resulting from the City's operation and manage-

ment thereof. The success of the market, from the City's standpoint, was, in no wise, dependent upon the financial success or failure of Union Pacific's investment in and operation of the team track yard. If its market facilities were occupied by tenants, its profit therefrom would be the same, if every carload of produce moved to the market over the lines of the appellee railroads and if Union Pacific's traffic benefit were limited to switching revenue. If all the cars moved to the market over the Union Pacific, the City's profit would not have been enhanced.

The City's obligation to repay the loan evidenced by the bonds was in turn unaffected by the success or failure of Union Pacific's investment in the team track yard. Neither was that obligation terminated even if the City wholly failed to lease its market facilities. The payment of the bonds was secured by the net revenues from all improvements then or thereafter located upon the entire Public Levee. Union Pacific was given no right to share profits of the market either during the time the bonds were being paid or after their payment. The ruling of the Court below has the inevitable consequence of construing every holder of its negotiable bonds as a joint adventure, although such holder can only claim his debt with interest and has no right to share in profits.

The Findings of the Court Below and the Undisputed Evidence Disclose That There Was No Agreement to Share Profits and Losses and Hence Under the Kansas Law There Could Be No Joint Adventure.

A scrutiny of the findings of fact of the Court below discloses no agreement between the City and Union Pacific whereby they were to share profits and losses of the mar-

ket. On the contrary, the findings refute the existence of any such agreement. In finding of fact No. 34 (R. 359-60) the Court below found that during the first 22 years the market was in operation all of the net revenue, not only of the market but of the Public Levee, would be required to repay Union Pacific the amount of its loan with interest and that the City would derive no profit except the benefit of an increase in its equity in the Public Levee improvements. This is a definite finding that no profits will result from the operation of the market for 22 years; that the City alone will derive the benefits of the increased value of its equity in the market facilities; and that after the repayment of the City's indebtedness to it Union Pacific shall be entitled to nothing. Plainly, Union Pacific's right to receive payment of its indebtedness is predicated upon the obligation of the revenue bonds and not upon any agreement to share in profits or losses of the market. By the same finding the District Court found that Union Pacific would derive an immediate and continuing benefit on account of the increase in its revenues which would be brought about from the improved volume of its traffic. From this it is clear that the Court properly found that whatever profits were derived from the operation of the market belonged to the City and whatever profits were derived from the operation of the rail facilities belonged to Union Pacific. Each party was entitled to profits and assumed full responsibility for losses for the separate enterprises conducted by each. Therefore, the conclusion of the Court below as to the existence of a joint adventure is controverted by its own findings of fact disclosing the absence of the element of sharing in profits and losses considered essential by the Kansas courts to the creation of such a relationship.

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Appellees' own evidence demonstrated that no sharing of profits and losses had been agreed upon between the parties. Plaintiffs' Exhibit 286 (R. 3464; offered, R. 1269), introduced by an accounting witness of the appellee Santa Fe to establish the net return to the City from its market facilities, included as the City's revenue the rental from the team track yard, together with the rental on all the market facilities. This was a plain recognition of the City's right to all of these rentals. It recognized, as well, Union Pacific's right to all the revenues derived by it from its operation of the rail facilities and the complete separation of the interests of the appellants intended and accomplished by their written agreements. These completely separate relationships are the direct converse of a joint venture where community of interest in profits and losses is the fundamental basis.

The "Part Played" by Union Pacific as Found by the Court Below Showed No Relationship of Joint Adventure.

The Court's conclusion that a joint adventure existed between the City and the Union Pacific respecting the market was based on "the part played" by Union Pacific. However, as will be shown, it did not find that because of "the part played" any agreement between the parties for a joint adventure or joint liability existed.

Its findings upon "the part played" by Union Pacific are:

It formulated a plan under which the market buildings might be built and owned by the City and constructed in part with a grant of Public Works Administration funds (F. F. 10, R. 343-4). It procured plans and estimates; negotiated with and interested the City in the promotion of the market (F. F. 11, R. 344). Originated a plan that

the project be financed by revenue bonds of the City, secured by revenues of the market and other Levee property, and a grant from the Public Works Administration; assisted in obtaining state legislation and the P. W. A. grant (F. F. 12, R. 344-6). Devised a plan for sale by the City of its revenue bonds to investment bankers; offered to execute a limited guaranty sufficient to meet service charges of the bond issue over and above rentals then accruing to the City, and jointly with the City negotiated the agreement for the sale of bonds. It refused to make a guaranty of the full interest requirements of the bonds, and when the investment bankers withdrew their commitment, purchased the revenue bonds from the City (F. F. 13, R. 346-7). It suggested the employment of leasing agents by the City (F. F. 14, R. 347-9); advanced funds to the leasing agents; negotiated with the leasing agents and the City for the cancellation of their contract in October, 1938, to meet requirements of P. W. A. (F. F. 14, R. 347-9); employed the leasing agents as its agents in November, 1938, after its purchase of the revenue bonds (F. F. 18, R. 350-1); sought tenants for the market; endeavored to induce produce dealers to transfer their business thereto (F. F. 12, R. 344-6); provided funds with which one of the leasing agents organized tenants of the farmers' market (F. F. 17, R. 350); purchased its ice requirements and those of an affiliate company from the tenant secured by it for the cold storage facilities (F. F. 27, R. 357); entered into a lease with the City of space on its Public Levee for a team track yard for serving the terminal (F. F. 15, R. 349); expended $603,000 in constructing said yard, title to which is held by it (F. F. 16, R. 349-50); jointly with the City supervised the construction of the terminal (F. F. 12, R. 344-6); presented to the City proposals for the payment by the City of proposed

adjustments with tenants and the method by which the City could raise the money to make such payments; urged and secured their approval by the City and upon such approval, negotiated with produce dealers in respect thereto (F. F. 19, R. 351-2); conspired with the City to induce the produce dealers to move their places of business to the City's market by means of such adjustments (F. F. 20, R. 352-4). It assisted the City in the conduct of proceedings in the Supreme Court of Kansas whereby the City sought and obtained decision of said Court that the City had power to make payments to produce dealers to induce them to move to its market; announced that it, as the holder of the revenue bonds, approved use of advance rental payments by the City for that purpose and that the Court should not interfere (F. F. 25, R. 355-6); engaged with the City and others in promoting, financing, building, and completing the terminal and advanced large sums of money for financing the preliminary expenses, which have not been repaid (F. F. 12, R. 344-6). It proposed that City Ice & Fuel Company advance $80,000 in rental and make a $25,000 deposit to guarantee bank loans (F. F. 24, R. 355).

It is obvious that these findings of the "part played" by Union Pacific, considered singly or collectively, are not in legal contemplation either a contract creating a joint adventure or joint liability, or evidence of any intention of the parties to enter into such a relationship or liability. The "part played" by Union Pacific cannot be treated as evidence showing the existence of a contract between the City and Union Pacific to share in profits and losses of the market and to provide for the community of interest and control essential under the Kansas cases to establish joint liability.

That the Court's conclusion of the existence of a joint

adventure or of joint liability between the parties was not based upon the finding of any agreement between them is plainly stated in its opinion (32 Fed. Supp. 917, at l. c. 920).

> "Since the City contends that the market is its individual enterprise and asserts full and sole responsibility for the payments which it concedes it has offered and contracted for, no good purpose would be served in reviewing the evidence bearing upon the City's activities"

and by the statement in its opinion (34 Fed. Supp. 4, 6):

> "Since the evidence was weighed and the factual conclusions arrived at on the hearing on the application for the preliminary injunction reflected the greater weight of the evidence, the findings of fact and conclusions of law filed herewith are to a large extent repetitions."

These observations of the Court below make it plain that uncontroverted evidence of the City's activities was ignored or treated as immaterial, and hence no agreement by the City to become a party to such a relationship was found.

The Motives and Purposes of the Parties as Found by the Court Below.

The City's purpose was to bring about industrial improvement and the incidental advantage to the City for that purpose (F. F. 42, R. 365) and the general benefit to the community (F. F. 43, R. 365) as distinguished from a mutual profit motive necessarily involved in a joint adventure. Recognition of the City's intent and purpose and the propriety thereof was given in the opinion of the Court below (34 Fed. Supp. 4, 7):

"While the Food Terminal was conceived and fostered by the Union Pacific and the promoters in conjunction with the City, *the general nature of the enterprise is such that it is properly classified as one from which general benefits will inure to the entire community. Public markets have existed almost from the beginning of mankind. The recorded history of civilization is replete with references to the early custom of the sovereignty furnishing at little or no cost, a place where the articles of common use may be offered for barter or exchange. The Food Terminal is a modern and glorified development of the ancient market places. It is admirably adapted to the handling of foods of general daily need. A city or community possessing a utility such as this Food Terminal may well be considered fortunate.* A city government with due regard for the well being of the community may in good faith conclude that the general good to be derived from such an enterprise justifies the exaction of less than the 'full, fair return' in money to which it and public utilities financed by private capital is entitled to demand." (Emphasis ours.)

The principal and compelling motives of Union Pacific throughout all phases of its activities as found by the Court below were to secure additional produce traffic for its railroad (F. F. 10, R. 343-4; F. F. 28, R. 357-8; F. F. 29, R. 358; F. F. 33, R. 359), to divert traffic from competing railroads, to exclusively operate the rail service for the terminal and avoid, as far as possible, sharing traffic with competitive carriers (F. F. 31, R. 358; F. F. 32, R. 359).

Thus the Court makes it plain that the objective of the City was to accomplish general benefit to the community, contemplated by the Kansas statutes, the grant of the Public Works Administration and the dedication of the

Public Levee. The objective of Union Pacific was its own profit from transportation services. The objectives were therefore several as distinguished from joint and negative any purpose to enter into a joint venture.

The Findings Make Clear that No Joint Ownership, Joint Interest in or Right of Control of the Market Facilities and the Rail Trackage Serving Them Was Intended or Agreed Upon.

The City owns and paid for the cold storage plant, produce dealers' buildings, farmers' market, and terminal trackage south of Jersey Creek constituting the market facilities (F. F. 16, R. 349-50). The City is, and, since the opening of the market, has been operating and managing the produce market and other facilities forming part of said terminal (F. F. 17, R. 350). The Union Pacific leased from the City space upon which to construct the team track yard serving the terminal (F. F. 15, R. 349). It owns and paid for the team track yard. It is and, since the opening of the market, has been operating the team track yard and other railroad facilities forming part of said terminal (F. F. 17, R. 350).

It is clear, therefore, that the acts and conduct of the appellants, as shown by the findings of the Court below, even if all its findings were—as we shall hereafter point out they were not—fully sustained by the evidence, constituted no representation or holding out by either of any intention to create any other or different relationship or liability than that shown by the written contracts of the parties, and that neither these contracts nor the acts of the parties establish the essential elements of a joint venture or joint liability under the settled law of Kansas.

It is made clear that there is no basis for any implication that a joint adventure was shown to exist by intention of the parties or by estoppel. Certainly under such

circumstances no inference can properly be drawn that such relationship was created. This is made clear by the Kansas cases dealing with the legal consequences flowing from the creation of such a relationship. It is the duty of the City to operate the Public Levee property in the public interest. *Board of Commissioners of Douglas County* v. *City of Lawrence*, 102 Kan. 656, 171 Pac. 610, 611. The policy of the state as to the City's operation and conduct of the market is stated in the Kansas statutes under which control and operation of the market is a matter committed exclusively to the governing body of the City. One of the consequences of the establishment of a joint adventure is that a right would be conferred upon the City's co-adventurer to have a voice in the management and conduct of the City's market which would contravene the public policy of the state as set forth in the decisions of its Supreme Court and by its legislature in the statutes in question.

Another consequence of the establishment of the relation as shown by the cases, *supra*, is a right to share in profits. It is too plain for argument that the City sharing its profits realized by it in the conduct of its public market with a private corporation would contravene the public policy of the state.

Another consequence of the creation of the relationship is that a co-adventurer has a lien on the partnership property to secure its share of the profits.

Reynolds v. *Roberts*, 119 Kan. 281, 237 Pac. 931.
First National Bank of Horton v. *Schuetz*, 103 Kan. 229, 173 Pac. 278.
Tenney v. *Simpson*, 37 Kan. 579, 15 Pac. 512, 520.

If such relationship is to be implied the City's co-adventurer would have the right to foreclose its lien and thus wrest the market from the control and ownership of the City and thereby destroy the City's public market and cause it to be appropriated for use as a private enterprise. No extended argument is required to demonstrate that such a consequence would bring about a result which the policy of the state forbids.

The conclusion to be drawn is eloquently expressed in the language of Mr. Justice Cardozo when he was a member of the Court of Appeals of New York, in *Berkey v. Third Avenue Ry. Co.*, 244 N. Y. 84, 155 N. E. 58, 60, where he said:

> "Where the co-adventure, if created, carries consequences along with it that are offensive to public policy the law will not readily imply the relation it condemns."

Plainly, in the face of the undisputed testimony and the findings of fact of the Court below, definitely showing that there was no intention to create any joint adventure, or joint liability that relationship or liability will not be implied to avoid the application of the law of Kansas as a basis for a further inference of a violation of the Interstate Commerce Act or Elkins Act.

The findings, the contracts between the parties, and the evidence definitely establish that the appellant City never intended to or did create in the appellant Union Pacific any interest, either legal or equitable, in the City's market or any lien thereon to secure the payment of the indebtedness evidenced by its revenue bonds. It intended and created no joint right in the Union Pacific to manage and control the market, the City retaining exclusive authority to do so, as the Court expressly found,

and in prescribing the rate of rentals and determining the amount of expenditures for operation, maintenance, and repair. It conferred on Union Pacific no authority with respect thereto. The lack of any element of mutuality, essential to any partnership relation, is plainly shown. Neither party intended or agreed upon any community of interest in the profits or losses of the market or any community of liability in connection therewith. It is conclusive, therefore, both under the evidence and the findings of the Court below that no joint venture or joint liability was shown to exist between the City and Union Pacific.

The Ruling of the Court Below that a Joint Adventure Existed Is Shown to be Erroneous from the Authorities Cited by it in Support Thereof.

No decision of the Supreme Court of Kansas was relied on by the District Court. It invoked *Bank of America National Trust and Savings Association* v. *Fisher*, 61 F. (2d) 53 (C. C. A. 9) where there was involved a written agreement under which one of the parties advanced funds which were to be repaid, plus 200% profit, out of oil produced. The contract contained the following express provision:

> "It is further understood and agreed that the relationship of the parties hereto shall be that of joint adventurers. * * * that the advancement of funds herein by second party shall in no manner or form be construed to be a loan from first party to second party, and that the same is purely and entirely a joint adventure."

In that case the parties by written contract had not only expressed their intention to create a joint adventure, but had embodied therein the essential element of sharing

in profits. The converse of that situation was before the Court below in the case at bar.

To the same effect is *Hobart-Lee Tie Co.* v. *Goodsky*, 329 Mo. 706, 46 S. W. (2d) 859, wherein the agreement between the parties provided that they would share profits from the business to be conducted. Respecting the contract, the Court said, l. c. 861:

> "It was further agreed that Cordia and the corporation would share equally the profits from the business."

A similar case cited by the Court below is *Denny* v. *Guyton*, 327 Mo. 1030, 40 S. W. (2d) 562, wherein was involved an agreement made by parties to share profits and losses arising from sale of horses and mules to the Allied Governments during the First World War. The Missouri Supreme Court in this case held that a joint adventure could be created only from a contract, express or implied. It said (l. c. 571):

> "It can arise only by contract or agreement between the parties."

The evidence disclosed no such contract in the case at bar, and the Court below did not find that any such contract existed.

Of similar effect is *Joring* v. *Harriss*, 292 F. 974 (C. C. A. 2) which involved a written contract under which the parties were to divide profits and be chargeable with losses in connection with the sale of shipments of cotton. In this case the Court held that it must be conceded that the written agreements, in providing for a division of the profits and losses, constituted a joint adventure (l. c. 978).

No legal support to the conclusion that a joint adventure exists is found in certain Federal Statutes cited by the Court below.

Section 10 (1), Title 49, U. S. C. A., cited by the Court below, makes it a misdemeanor for any common carrier or any director, officer, agent, or person acting for or employed by a common carrier to do or to permit to be done any act which is unlawful or to fail to do anything required to be done by the Interstate Commerce Act. Paragraph 4 of the said Section invoked by the Court as authority for his conclusion that a joint adventure existed provides that any person, officer, or agent who shall, by the payment of money or the solicitation thereof, induce or attempt to induce any common carrier to discriminate unjustly in his, its, or their favor against any other consignor or shipper shall be guilty of a misdemeanor and be punished as therein provided.

The Court further cites Section 42, Title 49, U. S. C. A. which directs that persons interested in matters before the Commission or the Court may be made parties in a proceeding instituted for the enforcement of the provisions of the Interstate Commerce Act. Plainly this section of the statute has nothing to do with joint adventure. It is merely procedural and not declarative of any substantive law.

We submit that the authorities cited and relied upon by the Court below as well as the Kansas cases, *supra*, disclose the fundamental error of the Court's conclusion that a joint adventure existed, because it is shown by the undisputed evidence and the findings of the Court below that there was no contract creating such joint relationship or liability.

III.

The findings of the Court below and the undisputed evidence establish that the appellant City is not a common carrier or engaged in any service of transportation and is not subject to the Interstate Commerce Act.[1]

No evidence was offered that the City owned or operated any cars or motive power or that it performed or ever intended to perform any service of transportation as that term is defined in Section 1, Paragraph 3 of the Interstate Commerce Act. It does not operate, supervise, or control the operation of the team track yard or of the industry or house tracks serving the market. It publishes no tariffs and receives no part of the tariff charges published and collected by Union Pacific. The evidence is undisputed that the rail transportation service of the market is performed by Union Pacific as to the team tracks and industry tracks (Pl. Ex. 26, R. 2165-2173; offered, R. 419; pp. 50, 52, *supra*), and by the Union Pacific and the appellee Missouri Pacific as to the cold storage plant, wharf and dock under regularly published tariffs (R. 757; Pl. Ex. 25, R. 2147-65; offered, R. 419; pp. 28-9, *supra*).

The provisions of the Interstate Commerce Act apply to common carriers engaged in "the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment" (Title 49 U. S. C. A. Sec. 1). "The term 'railroad' * * * shall include * * * all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease * * *" (Title 49 U. S. C. A. Sec. 1[3]). The City's ownership of the industry tracks serving the market

[1]Assignments II, III, R. 383-4; IX, R. 385, and XV, R. 387.

buildings but operated by the Union Pacific as a common carrier under lease from the City does not constitute the latter a common carrier by railroad.

In *General American Tank Car Corp.* v. *El Dorado Terminal Company*, 308 U. S. 422, it was held that an owner of tank cars leased to a railroad was not a common carrier subject to the Interstate Commerce Act, notwithstanding such cars are specifically designated as being a part of transportation. This Court said, l. c. 428:

> "They (the railroads) may, if they deem it advisable, lease them (the tank cars) so as to be in a position to furnish them according to the demand of the shipping public, and, if the carriers do so lease cars, the terms on which they obtain them are not the subject of direct control by the Interstate Commerce Commission. If the carriers pay too much for the hire of such cars the Commission may, of course, refuse to allow them to reflect such excess cost in their tariffs. *The lessor of such cars to a railroad, however, is not itself a carrier or engaged in any public service. Therefore its practices lie without the realm of the Commission's competence.*" (Parenthetical expressions and emphasis ours.)

In *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, Mr. Justice Holmes, speaking for this Court, held that Armour Car Lines, which manufactured, owned, serviced and leased refrigerator cars to railroads for the shipment of perishable products for compensation paid to them by the railroads, was not a common carrier subject to the Interstate Commerce Act. This Court said, l. c. 443:

"It has no control over motive power or over the movement of the cars that it furnishes as above, and in short, notwithstanding such argument to the contrary, is not a common carrier subject to the act."

The conclusion of the Court below (C. L. 20, R. 374; C. L. 15, R. 372-3; C. L. 17, R. 373; C. L. 19, R. 374; C. L. 21, R. 375, and C. L. 22, R. 375), that the appellant City has the same status under the Interstate Commerce Act and the Elkins Act as the common carrier with which "it is associated" in a joint project or joint undertaking is flatly contradicted by the Court's own findings of fact No. 17 (R. 350).

"Defendant Union Pacific is now and since its opening has been operating the team track yard and other railroad facilities forming part of said terminal."

And again in (FF 31, R. 358):

"The plan of the Union Pacific in connection with the Kansas City Food Terminal included a plan *whereby all railroad service* in connection with such terminal, including the operation of the yard tracks, drill tracks, spur track, and side tracks forming a part of the facilities of said terminal *should be operated exclusively by the Union Pacific.*" (Emphasis ours.)

Therefore, the Court below specifically held that the alleged "plan of the Union Pacific" in which the City is held to have joined, contemplated that the appellant City *should not engage in any activity as a common carrier by railroad or the furnishing of any transportation service in connection with the market.* That the City intended no common carrier activity is also shown by the undisputed

evidence and by the official action of the City in relation thereto.

The erroneous conception that the City became a common carrier led the Court below into the conclusion recited in its opinion in 32 Fed. Supp. 917, l. c. 923:

> "The proposed payments to Missouri dealers to induce them to move to the new market not being made to all tenants at the new market and being in the nature of bonuses the amount of which was not based on actual loss or expense, fall within the classification of discriminations prohibited by the Elkins Act. As stated in the syllabus of *United States* v. *Union Stock Yards Co.*, 226 U. S. 286, 33 S. Ct. 83, 57 L. Ed. 226:
>
> "'A shipper receiving a bonus from the carrier for erecting a plant on the line of the carrier has an undue advantage over a shipper not receiving any bonus or a smaller bonus.'
>
> "The prohibition of the law applies to any person or corporation whether carrier or not and prohibits the act which produces the forbidden result. Hence, it is not necessary that the carrier make the concessions. The City may not make concessions to shippers if the result is discrimination among shippers relative to interstate transportation."

Passing for a moment the recital in the quoted syllabus of the decision of this Court in *United States* v. *Union Stock Yard, supra,* that the "bonus" in question there was received *"from the carrier,"* it should be observed that there is no evidence in this record that the appellant City ever intended to pay any bonus to any tenant or that it intended at any time to pay any tenant more than the amount required to reimburse him for actual loss and expense sustained. Neither is there any

evidence that the City at any time intended to pay anything to any tenant who sustained no such loss.

This is true notwithstanding that, in the single instance of the defendant Litman, it developed from his testimony on the trial, as a witness for the appellees, that his sworn statement with respect to his existing rental obligations, on the basis of which the City negotiated the proposed settlement with him, as the result of his own error, overstated the amount of that obligation (p. 76, *supra*). But the evidence that the City and its Legal and Advisory Committee acted in its negotiation of the intended settlement upon the basis of Litman's sworn claim demonstrates that the City did not intend to agree with Litman upon an amount exceeding his actual damage. There is no evidence that the City had or has any intention to conclude the transaction after Litman's testimony at the trial developed the error in his sworn statement.

No evidence whatever was offered by the appellees that the damage claimed by any other tenant with whom the City contemplated settlement exceeded his actual damage or that the City ever proposed to obligate itself for any sum in excess of such damage.

The decisions in *Spencer Kellogg & Sons, Inc.* v. *United States,* 20 F. (2d) 459 (C. C. A. 2), and *United States of America* v. *Union Stock Yard and Transit Company of Chicago,* 226 U. S. 286, plainly do not sustain the conclusion drawn therefrom by the Court below. In point of fact they demand precisely the contrary conclusion with respect to the City's contemplated reimbursement of tenants' actual losses.

In *Spencer Kellogg & Sons* v. *United States, supra,* the defendant elevator company elevated grain from lake boats and loaded it into railroad cars for further rail movement. Published tariffs established the rates for the

movement of "ex lake grain" from Buffalo to seaboard, constituting the total charge to be paid by the shipper, including the elevation from the holds of vessels and transportation to destination. The tariff included a published allowance for the services of elevation performed by the elevator company of one cent per bushel to be paid by the railroad company. The elevator company was actually engaged in the performance of transportation services as defined by the Interstate Commerce Act and had agreed with the carrier to perform the elevation service in accordance with the established tariff governing the movement of property through its facilities and accepted the published allowance therefor. *Out of the portion of the freight rates received by it, the elevator company refunded to shippers one-half cent per bushel.* The portion of the opinion relied upon by the Court below in relation to the Elkins Act was quoted by the Court in its opinion (32 Fed, Supp. 917) as follows, l. c. 923-4:

> "Its broad and sweeping language is a clear expression of the intendment of Congress to make the purposes of the act applicable to any person or corporation who might be in a position to commit an act which would accomplish the forbidden result, namely, the transportation of property at less rates than those named in the tariffs published by the carriers. • • • The purpose of the act was not to regulate carriers or shippers. Congress intended to prohibit all rebates, concessions, or discrimination with respect to railroad transportation service. This was not confined to the regulation of carriers and shippers. • • • It was not intended and does not permit anyone else, other than shippers and carriers, to grant rebates or concessions."

To this accurate statement of the scope of the Elkins Act the appellants take no exception, but the distinction between the *Spencer Kellogg* case and the case here was made equally certain by the following portion of the opinion of that case, l. c. 461:

> "The act concerns itself with preventing concessions and rebates with respect to interstate transportation of property, and not with carriers, shippers, their agents, or anyone else, *unless and until their acts result in the accomplishment of that which the statute forbids.*" (Emphasis ours.)

And by the concluding paragraph, l. c. 462:

> "The penalty is imposed here, *not because it was acting for the carrier, but because it performed a service of transportation, and gave a rebate to its shipper or consignee from the compensation received for that part which it performed.*" (Emphasis ours.)

It is plain, therefore, that the conviction of the defendant in that case was sustained:

> (1) Because the defendant performed a service of transportation, and
>
> (2) Because its act did "result in the accomplishment of that which the statute forbids," namely "the transportation of property at less rates than those named in the tariffs published by the carrier."

Plainly, the result there accomplished by the elevator company's refund to the shipper out of the one cent allowance included in and shown by tariffs to be payable to it for its performance of a transportation service was that the shipper obtained the transportation service

rendered by the common carrier at a cost to it of exactly one-half cent per bushel less than the published tariff rate.

The record in the case at bar demonstrates beyond any doubt that the City performs no transportation service, that it receives no part of the published tariff rate, and that it is not a party to or mentioned in and could not become a party to the published tariff. The opinion in the *Spencer Kellogg* case demonstrates, therefore, that in the absence of evidence that the appellant City intended to employ funds of Union Pacific in making the proposed reimbursement to tenants, the Elkins Act is "not concerned with" either the City or the carrier because only by such proof could it be established that the act of the City "accomplished the forbidden result, namely the transportation of property at less rates than those named in the tariffs published by the carrier."

United States v. *Union Stock Yard, supra,* was a suit brought to compel the Stock Yards Company and the Junction Company to comply with Section 6 of the Interstate Commerce Act by filing and publishing tariffs and to enjoin performance by the Stock Yards Company of a written contract by which it had agreed to pay $50,000 to a packing company in consideration of its agreement to construct a packing plant adjacent to the yards of the Stock Yards Company and of its further agreement that all live stock slaughtered or killed at the plant should pass through the stockyards, for which the Stock Yards Company should receive the customary charges, and that such charges should also be paid upon live stock which did not move through the stockyards. The Stock Yards Company had for many years, in addition to the operation of the stockyards and in accordance with its

charter power, operated a railroad which supplied transportation service in connection therewith. Prior to the agreement in question it had leased its railroad and the equipment thereof to the Junction Company which thereafter performed the rail service theretofore rendered by the Stock Yards Company, but the latter still continued to perform the loading and unloading of live stock at its yards, specifically included as a part of transportation by the provisions of the Interstate Commerce Act. Under its lease the Stock Yards Company received as rental for the railroad and equipment two-thirds of the profits derived by the Junction Company in rendering transportation service. All of the stock of the Stock Yards Company and of the Junction Company was owned by the Investment Company, which had guaranteed the performance by the Stock Yards Company of the contract in question. It was charged in the Complaint that the Stock Yards Company and the Junction Company were common carriers by railroad and as such required by the provisions of the Interstate Commerce Act to file and observe published tariffs. In the decision of the case in the lower court (192 F. 330) the court held that the Stock Yards Company was not a common carrier by railroad and that it was not required to file or publish tariffs covering its charges for the service rendered. The court said, l. c. 343:

> "While section 1 of the Elkins Act as amended (Act June 29, 1906, 34 Stat. 584, 587), after prohibiting 'any person or corporation' from rebating or discriminating in respect to an interstate transportation, subjects to criminal prosecution 'any person or corporation, whether shipper or carrier,' who knowingly violates its provisions, *section 3 of the Elkins Act, under which this suit is brought, authorizes*

equity proceedings to enjoin such offenses only when a 'common carrier' has committed or is about to commit them." (Emphasis ours.)

Because of its determination that the Stock Yards Company was not a common carrier the trial court dismissed the Complaint as to the Stock Yards Company, but held the Junction Company to be a common carrier and required it to file and publish its tariffs.

The essential issue in that case, in so far as here involved, was whether the contemplated payment was to be made by a common carrier. This is made clear by this Court's holding that the Stock Yards Company and the Junction Company were common carriers because (l. c. 305):

> "• • • they are made such by the terms of their charters, hold themselves out as such and constantly act in that capacity, and because they are so treated by the great railroad systems which use them."

And (l. c. 306):

> "We think that these companies, because of the character of the service rendered by them, their joint operation and division of profits and their common ownership by a holding company, are to be deemed a railroad within the terms of the act of Congress to regulate commerce, and the services which they perform are included in the definition of transportation as defined in that act."

The absence, in this case, of the factors to which this Court gave consideration in its conclusion that the Stock Yards Company was a common carrier is obvious:

1. The City possesses no charter power to operate a

railroad. The Stock Yards Company had express charter power to do so and had for many years operated a railroad.

2. The City neither loads nor unloads cars, is not engaged in the performance of any other transportation service and has never been so engaged. The Stock Yards Company, notwithstanding the lease of its rail lines and equipment, continued to perform a transportation service in the loading and unloading of live stock.

3. The City does not participate in the earnings derived by any common carrier from any transportation service. The Stock Yards Company received two-thirds of the profits from the transportation services rendered by the Junction Company.

4. The City has never held itself out as a common carrier or offered to perform any transportation service. Both the Stock Yards Company and the Junction Company held themselves out as performing and did perform transportation service as common carriers and both were so recognized by the transportation systems of the country.

5. The Stock Yards Company and the Junction Company were jointly operated and under common ownership. No similar situation is here shown.

If, as the Court below appears to have held, the status of the City as a common carrier and the source of the funds with which the City intended to reimburse its tenants' losses are wholly immaterial, provided only its public market is located where it may be reached by the lines of a single carrier, then clearly this Court in *United States* v. *Union Stock Yard* would not have devoted serious and detailed consideration to the status

of the Stock Yards Company as a common carrier, but it is plain from the opinion that the question was not regarded by this Court as unimportant (l. c. 308):

> "Certainly as to the company which receives no such bonus there has been an undue advantage given to and an unlawful discrimination practiced in favor of Pfaelzer & Sons. *If these companies had filed their tariffs, as we now hold they should have filed them, they would have been subject to the restrictions of the Elkins Act as to departures from published rates—and we must consider the case in that light—and this preferential treatment, as we have said, would have been in violation of that act.*" (Emphasis ours.)

Clearly, therefore, unless the appellant City is a common carrier or engaged in the performance of a transportation service for which tariffs are or must be filed, nothing in *Spencer Kellogg & Sons* v. *United States* or *United States* v. *Union Stock Yard* supports the conclusion of the Court below that the City is subject to both Acts or its final decree requiring, contrary to the express conclusion of the Supreme Court of Kansas in *State ex rel. Parker* v. *Kansas City*, an exact equality of charges to occupants of its public market, where, as will be shown, the undisputed evidence demonstrates that no use of the funds of a common carrier and no reduction in its published tariff rates was ever intended, or sought to be accomplished by either of the appellants.

IV.

In ruling that appellant Union Pacific had a first lien on all the rentals derived by appellant City from its public market, the Court below erroneously failed to apply and follow controlling statutes and law of the State of Kansas and ignored its findings of fact which disclose there is no basis for its ruling.[1]

The Court below held:

> "The defendant Union Pacific, by the terms of the revenue bonds in question, *is given a first lien upon all rentals from said market and said food terminal.*" (C. L. 12, R. 371.) (Emphasis ours.)

This conclusion ignores the law of the state held in *State ex rel. Parker* v. *Kansas City, supra,* as to the City's right to make reimbursement from its revenue funds to its tenants for losses sustained by them as being a matter within its exclusive concern. It was upon this erroneous hypothesis that the Court below ruled that a carrier's funds were being used as to result in a carrier being caused to transport property at less than its published rates. It will be shown that the bondholder does not have a first lien under the Kansas Statutes and the City's ordinances as construed by the highest Court of the State.

It has been pointed out that the obligation of the City and the rights of the holder of its revenue bonds must be determined by the terms of the bonds themselves, the ordinance under which they were issued, and the statutes of the state, as interpreted by the highest court of the state (*supra* pp. 129-131). The bonds recite upon their face that they were issued in full compliance with the

[1]Assignments XI, XII, R. 386.

provisions of Sections 13-1238 to 13-1245, G. S. Kan. 1935, as amended and in conformity with Ordinance No. 30206 (Pl. Ex. 62-B, R. 2557-78; offered, R. 474). By Section 10 of that ordinance (R. 2571-2) it is provided that the bonds shall constitute a first lien and claim upon the revenues of the Public Levee, *"subject only to the payment of all sums required for the reasonable and proper operation, maintenance and repair of said Public Levee."*

That the revenue bonds here in question were issued in strict accord with the statutes of the state was determined in *State ex rel. Beck* v. *Kansas City,* 149 Kan. 252; 86 P. (2d) 476.

In the light of the specific provision of the bond ordinance as to the lien of the bondholder, it is obvious that unless the statutes of the state *created a first lien upon all of the revenues of the market,* then no such lien existed. The statutes of Kansas, as construed by its highest court, disclose that no such lien was ever created.

The Construction of the Statutes of the State by Its Supreme Court.

It was expressly alleged in the Complaint that on request of the City by its Resolution No. 11275 (R. 26-7) the Attorney General of the state filed a petition in *quo warranto* in the Supreme Court of the state, seeking to enjoin the City and its officers from expending any of its Public Levee revenue funds in payment to any prospective tenant, upon the grounds: (1) that such payment would be in violation of the laws of the state of Kansas and the ordinances of the City; and (2) that such payment would violate the covenant with the Union Pacific, as the holder of the revenue

bonds, expressed in Ordinance No. 30206 (R. 15-16). It was also alleged in the Complaint below that the Supreme Court of Kansas handed down a *per curiam* decision, dismissing the petition of the Attorney General and upholding the right of the City under the statutes of Kansas and the ordinances of the City to make such payment (R. 17). Copies of the petition of the Attorney General, answer of the City and its officers, and of the *per curiam* decision of the Supreme Court were attached to the Complaint herein (R. 27-72).

The material allegations of the Attorney General's petition and the answer of the appellant City and its officers are set forth at length, *supra* pp. 70-73. In substance, the petition charged that the proposed payments and rental credits were not reasonable and proper expenses of the operation of the market and if made from the revenues thereof *would violate the contract of the City with the bondholder as reflected in the ordinance which authorized the issuance of the bonds.* The City's answer asserted that the payments were reasonable and proper expenses of the establishment and operation of the market; the amounts necessary therefor were not subject to the lien of the bonds and the bondholder so recognized. That a plan was under consideration for the use by the City of rentals to be paid in advance by lessees of the City under existing long term leases. That prior to the adoption of its Resolution 11275, the City had investigated and determined that the rates of rental prescribed by it would be adequate to pay all of the expenses of the market, including the proposed adjustments, credit in subsequent years for advance rental payments, and the principal and interest upon the bonds. The case was presented to

the Supreme Court upon the Attorney General's motion for judgment on the pleadings. The issue tendered for decision was whether the City could lawfully make the proposed payments from its Public Levee Revenue fund, including the contemplated advance rentals, as a reasonable and proper expense of the City in the operation of the market, without violation of the laws of the state or of the conditions of the ordinance under which the bonds were issued. In the determination of this question, the Court construed the basic statutes (Secs. 13-1239 to 13-1243, inc., and Sec. 13-1245, G. S. Kan. 1935; and Sections 13-1238 and 13-1244, G. S. Kan. 1935, as amended 1937). It held that the City was thereby authorized to improve its Public Levee and to provide funds therefor by the sale of revenue bonds, payable exclusively out of the income of the Public Levee. Of Section 13-1242, which provides for the manner in which the bonds shall be paid, the Court said (98P. [2d], l. c. 105):

> "The statute contemplates that the revenues out of which the bonds are to be paid are to be derived out of the rates and charges to be exacted by the city for the use of the services and facilities as outlined above, 'which rates and charges so fixed shall be sufficient *to pay all expenses of the city in connection therewith and cover the cost of operation and repairs, pay all interest charges upon all indebtedness created* for the purpose of improving, constructing, reconstructing, repairing or improving of such public levee and the improvements and facilities thereon for which such revenue bonds were issued to so improve, construct, reconstruct or repair *and to provide a sinking fund sufficient to pay off such indebtedness at maturity.*" (Emphasis ours.)

The Court next considered Section 13-1243, G. S. Kan. 1935, under which the City was authorized to enter into a lease for the improvements, at l. c. 105:

> "* * * *for such rental and upon such conditions as in the judgment of said governing body will be to the best interest of such city,* provided the rent fixed by any such agreement and lease shall be sufficient to liquidate and pay all expenses of the city connected therewith and the principal and interest of all revenue bonds issued or to be issued to pay the full cost of such improvements and facilities so leased." (Emphasis the Court's.)

The Court held that the powers thus conferred upon the City were very broad. It said, l. c. 105:

> "Under such a broad grant of statutory power, it would appear that what the city and its governing officials undertake to do would have to transcend all reasonable bounds of official discretion before a court would be justified in interfering."

The object of the statute and the duties of the City thereunder were stated by the Court, l. c. 105:

> "Clearly the statute implies that *it is the duty of defendants to make the market a success.*" * * In only two matters does the statute particularize, —(first) that neither the cost of constructing the market nor any of the incidents or concerns shall ever become a charge upon the city's general revenue fund nor directly or indirectly a burden on the city's taxpayers, and (second) that *the city shall fix rates and charges for the use of the market at such figures as will pay the principal and interest on the bonded debt, and meet all pertinent expenses of the market.*" (Emphasis ours.)

Respecting the specific problem with which the City was confronted, the Court said, l. c. 105:

> "If this public market had been called into existence by a corporation * * * and if its board of directors should find their corporate enterprise stalled at its inception for want of tenants and had deemed it expedient and necessary to expend certain of their corporate funds to aid and induce desirable tenants to enter into leasing contracts for space units in the market, surely their power to do so would pass unchallenged. *Confronted with this precise problem, why may not the defendants do the like in the actual case before us?*" (Emphasis ours.)

After reviewing many decisions of its own and other courts, the Kansas Supreme Court concluded its opinion, l. c. 108:

> "The Court holds that the matters proposed in the city's Resolution No. 11275 are the exclusive concern of the defendant city and its governing body, and should not be halted by judicial interference."

The conclusion of the Court clearly was that the payments which the City proposed to make out of its revenue account, including advance rental payments, were reasonable and proper expenses of operation which the City was authorized to make and the funds therefor were specifically exempt, by the plain provisions of the bond ordinance, from the lien of the bondholder. The Court dealt solely with the power of the City, made no mention of the City's allegation that the bondholder agreed that the expenditures were proper expenses of operation and the amounts necessary therefor not subject to the lien

of the bonds, and predicated its decision solely upon the express terms of the statutes under which the City acted. It plainly held that so long as rates of rental had been fixed by the City in accordance with the mandate of the statute, such determination was not the subject of judicial review. The character of the proposed exxpenditures and the City's power to make use of the revenue fund for their payment under both the statutes and the bond ordinance were squarely in issue. Had a lien been created *upon all of the revenues of the Public Levee* to secure the payment of the bonds, as the Court below erroneously held, then plainly no decision could have been rendered that the City's contemplated action was lawful or was the exclusive concern of the City and should not be halted by judicial interference.

The conclusion of the Court below as to the character and extent of the lien of the holder of the City's revenue bonds, moreover, is contrary to its finding of fact No. 34 (R. 365), in which it is plainly stated *that the lien of the bonds is subject to the payment of operating expenses* and by which it found that under the City's estimates of revenues and expenses, including the proposed adjustments, both the principal and interest of the revenue bonds can be paid off in 22 years, eight years before their final maturity.

The Court below made clear its sweeping disregard of the law of the state as determined in *State ex rel. Parker* v. *Kansas City* (C. L. 13, R. 371-2). It held:

> "The Supreme Court of Kansas in said *quo warranto* proceedings *had no jurisdiction of the plaintiffs herein* or of the subject matter, or any part of the subject matter, or of any issue now before this court. The Supreme Court of Kansas did not determine, attempt to determine, or purport to de-

termine any issues in this case, but *merely held that the City of Kansas City, Kansas, had not and would not violate any law of the State of Kansas by offering, agreeing upon or giving special inducements to produce dealers to move from Kansas City, Missouri, to the Kansas City Food Terminal. The Supreme Court of Kansas had no jurisdiction to determine or attempt to determine whether the offering, agreeing upon or giving of special inducements to produce dealers violated the terms of the revenue bonds and the lien of defendant Union Pacific upon the rentals of said produce terminal.*" (Emphasis ours.)

It thus appears that the Court below brushed aside the decision in *State ex rel. Parker* v. *City of Kansas City, Kansas,* in part, upon the novel ground that that Court "had no jurisdiction of the plaintiffs herein, of the subject matter or any part of the subject matter, or of any issue now before this court." The short answer to this is, of course, that a Federal Court, required to ascertain and apply the law of a state, is interested, not in the parties involved in and bound by the decision in which the law was interpreted and defined by the highest court of the state, *but in the law so interpreted and defined.* Until the decision below, no Federal Court had ever determined that the construction of the statutes of a state or the power of a municipality of the state could be determined only in a proceeding in which were present all of the parties, who, in subsequent litigation, sought to avoid the application of that law.

The conclusion that the Supreme Court of Kansas did not attempt or purport to determine any issue in this case but merely held that the City would not violate any law of the state by its proposed payments to tenants, and the concluding assertion that the Supreme Court of

Kansas had no jurisdiction to determine whether such payments violated the terms of the revenue bonds and the lien of Union Pacific upon the rentals of the produce terminal are equally unfounded. By the undisputed evidence issue was squarely joined in the *quo warranto* case upon the Attorney General's charge that such use of the revenue funds would violate the City's covenant contained in its ordinance authorizing the issuance of the bonds. The Complaint, herein, specifically alleged (R. 17) that the decision of that court sustained the power of the City to make the proposed payments under that ordinance. The validity of that identical ordinance had been challenged in *State ex rel. Beck* v. *Kansas City,* 149 Kan. 252; 86 P. (2d) 476, and it was the settled law of the state that the ordinance was enacted in strict conformity with the statutes of the state. Since the bond ordinance specifically provided (R. 2571-2) that the lien of the bondholder should not extend to such revenues of the Levee as were necessary for the payment of reasonable expenses of operation, maintenance and repair, this conclusion of the Court below can be read only as an ineffective effort to evade the obligation resting upon a Federal Court to follow and apply the statutes and the laws of the state as determined by its highest court.

The decree of the District Court, in so far as it rests upon its determination of the existence of a first lien of the Union Pacific upon the revenues which the City proposed to use in settlement with its tenants, is erroneous because under the ordinance of the City and the statutes of the state, as interpreted by its highest court, the lien did not exist.

V.

The ruling of the Court below that Union Pacific waived its lien upon the revenues which the City proposed to use in settlement with its tenants rejects controlling law of the State of Kansas and is contrary to the evidence.[1]

The Court below held that:

> "Defendant Union Pacific waived its first lien upon the sum of $80,000 in advance rentals paid by the City Ice & Fuel Company by promoting and negotiating the plan of making cash payments to produce dealers of said $80,000 and waiver of said lien by said defendant's counsel before the Supreme Court of Kansas at the hearing before that Court of the *quo warranto* proceedings mentioned in the evidence." (C. L. 12, R. 371.)

It must be conceded that under admitted facts in the *quo warranto* proceedings, confirmed by appellee's evidence in the Court below, the City's schedule of rentals was substantially in excess of the minimum required by the Kansas Statutes. In that situation the bondholder had no legal right which was violated or threatened by the City's intended action and therefore no right which it could waive.

The Alleged Waiver in the Kansas Supreme Court.

The conclusion of the Court that the participation of the Union Pacific in the proceedings before the Supreme Court in *State ex rel. Parker* v. *Kansas City* (*supra*) resulted in a waiver of its lien upon funds which the City contemplated using is obviously based upon the Court's erroneous conception that the bondholder's lien extended to all the revenues of the Public Levee. Had

[1] Assignments XI, XII, R. 386.

the Court below followed and applied the law of Kansas as expressed in the statutes and decisions of its Supreme Court, in the ordinance under which the bonds were issued (R. 2571-2), in the Court's own finding of fact No. 34 (R. 359-60), and in the Complaint (R. 17)—each of which established that the lien did not extend to any sums required for the payment of the reasonable and proper operation, maintenance and repair of the Levee—this error would have been avoided.

Its conclusion with respect to any waiver by Union Pacific is contrary to the undisputed evidence. The revenue bonds of the City were purchased by Union Pacific upon the opinion of its own counsel that the broad discretionary power of the governing body of the City conferred upon it by the state statutes as to rates of rental and the amounts of expenditure for the operation of the property was not subject to judicial control at the instance of the bondholder (Pl. Ex. 7, R. 1640; offered, R. 418).

It is undisputed that before the City adopted its Resolution 11275, it was advised by the City Attorney and its Legal Committee, which had given consideration to the question and had been advised of the views of Union Pacific counsel, that the City's right to make the payments in question was dependent upon its having complied with the mandatory requirements of the statute, made a part of the bond ordinance, by establishing rates of rental sufficient to enable it to discharge its full obligation to the bondholder in addition to meeting all expenses of the market, including the payments in question (K. C. K. Ex. 194, R. 2997-9; offered, R. 813; pp. 65-6, *supra*).

It was likewise shown by the evidence (Pl. Ex. 284 (R. 3454-5; offered, R. 1248); K. C. K. Ex. 228 (R. 3044-6;

offered, R. 947); and specifically alleged in the City answer in the *quo warranto* proceeding (R. 65) that, befo adopting the Resolution 11275, the City had caused caref estimates to be made of its ability to discharge all its ob gations to the bondholder and pay all its expenses in co nection with the market, including the proposed adjus ments, and that the City had determined that the rates rental established by it would provide adequate funds thu to comply with the mandatory requirements of the statute The result of the City's investigation was alleged in deta in its answer in the *quo warranto* procedings (R. 65-7 in the preparation of which counsel for Union Pacif participated. The answer likewise alleged that the holde of the revenue bonds agreed that expenditures of th character contemplated by the City were necessary an proper expenses of establishing and operating the mark and the amounts required therefor were not subject t the lien of the bonds (R. 63; p. 73, *supra*).

It is undisputed that prior to the *quo warranto* pr ceedings, consideration had been given by the City t obtaining an advance rental payment from some of it tenants (the City's answer in that proceeding specificall so alleged [R. 65]) and that the appellant McComb was advised that Union Pacific would not make an advanc rental payment (R. 904, 922; p. 75, *supra*).

By testimony of the Kansas Attorney for the appelle Santa Fe, who attended the argument of the *quo warrant* proceedings before the Supreme Court of the state at th request of that appellee's General Solicitor, it was show that after arguments had been presented by the City' counsel, counsel for the Union Pacific stated to th Court that he represented the bondholder, Union Pacifi which was also interested in the market because of it

expenditure of some $500,000 in the construction of tracks serving the facilities. He called attention of the Court to the fact that the case had been submitted to it upon the Attorney General's motion for judgment on the pleadings, which required the Court to accept as true the allegations of fact in the City's answer; that it was shown in the answer that the amounts proposed to be expended by the City would be approximately 2% of the total income or revenue of the City over a ten-year period; that in order to have the market a success, it was necessary to have dealers there who were leaders, and that the Court should not interfere judicially with the proposed administrative action on the part of the City (R. 664 *supra*).

This testimony makes clear that the counsel for Union Pacific, who, more than a year before, had concurred in advising his client that the discretion of the Board of City Commissioners in relation to rates of rental and expenses of operating the market could not be judicially controlled (Pl. Ex. 7, R. 1640; offered, R. 418) *made no mention of any waiver of any right of the bondholder.* On the contrary, he called specific attention to the admission of the Attorney General of the facts in the City's answer (R. 664; p. 74 *supra*), which established that the City had fixed rates of rental exceeding the requirements of the statute thereby enabling the City to meet all of its obligations to the bondholder and to pay all expenses of the market, including the proposed settlements with its tenants, after giving effect to the advance rental payments and credit therefor in subsequent years. Upon these facts Union Pacific counsel would have been lacking in candor to the Kansas Supreme Court had he not stated that the City's right to make the proposed payments should be sustained. Instead of this ex-

pression being construed as an intention of Union Pacific to waive any of its rights as a bondholder counsel's statement was a plain assertion that under the City's estimates of revenues and expenses, the accuracy of which was admitted by the Attorney General, every right of the bondholder accorded by the statutes and bond ordinances had been fully protected. No tenable ground for judicial interference could be asserted by the bondholder when it affirmatively appeared none of its legal rights had been threatened or violated.

The City's estimates before the Court in the *quo warranto* proceedings were offered in evidence as K. C. K. Exhibits 228 (R. 3044-6; offered, R. 947) and 229 (R. 3047; offered, R. 949) on March 11, 1940, supported by testimony of the City's Auditor, showing in detail the basis of the calculations and demonstrating that over the thirty-year period the City would receive, in excess of all bond and interest requirements and all expenses of the operation of the market, including the proposed payments to tenants out of the advance rental payments to be credited against future rentals, a cash surplus in excess of $2,800,000 (*supra* pp. 67-8). The Court below found (F. F. 34, R. 359-60) that on the basis of this estimate, including the amounts proposed to be expended in settlements with tenants, the City could discharge its entire obligation to the bondholder in 22 years, or eight years in advance of the full maturity of the bonds.

These estimates were accepted by an expert accounting witness of appellee Santa Fe, who prepared and offered in evidence Plaintiffs' Exhibits 286 (R. 3464; offered, R. 1269) and 287 (R. 3466; offered, R. 1271) on May 1, 1940. This witness set up as a charge to operating expenses a theoretical or assumed annual depreciation on the market facilities of $65,388 per annum.

Except as to the depreciation charge the estimate of revenues and expenses shown in K. C. K. Exhibit 229 was accepted and adopted. Plaintiffs' Exhibit 286 ignored the bond and interest requirements, but showed an annual net return to the City from the revenues of its Public Levee, after the depreciation charge on the market facilities, of $220,698 per annum and upon the market facilities alone of $109,472. This return on the market properties as a whole was shown by the exhibit to represent a net return to the City of 2.83% per annum upon the reproduction cost of the market facilities plus the value assigned by appellees to the Public Levee land occupied by those facilities, aggregating $3,870,169 (*supra* p. 90).

It was pointed out by the Court below, on the introduction of this exhibit, that the rate of return thus shown gave no effect to earnings from or the use of the amount set aside by the witness for depreciation (*supra* p. 90), and the witness testified that these amounts might properly be used in the retirement of the City's outstanding revenue bonds (*supra* p. 91). By the Court's finding of fact No. 34 (R. 359-60), it is expressly held that under the provisions of the bond ordinance, amounts not required for payment of bond and interest maturities and expenses were required to be so used. By K. C. K. Exhibit 376 (R. 3848; offered, R. 1386), it is shown that by use of the depreciation reserve, set up by appellees' expert accountant, in the retirement of revenue bonds, a total of $1,765,476 of the principal amount thereof could be retired at maturity, and result in an interest saving to the City of $36,288.88 per year (*supra* p. 91).

If the depreciation reserve be not thus applied then by Plaintiffs' Exhibit 286, it is shown that on the basis of rentals established by the City, long before the *quo*

warranto proceedings were instituted, its net revenue from the Public Levee facilities of $220,698 per annum after depreciation would, over a period of 30 years, aggregate $6,620,940, or $1,425,670 in excess of the total bond and interest requirements (K. C. K. Exhibit 229). If to this sum be added the accumulated depreciation reserve of $1,765,476, the City's net accumulated surplus, after the payment and retirement at maturity of its entire indebtedness to the Union Pacific, would aggregate $3,191,476, an amount substantially in excess of that shown by the City's own estimate.

Notwithstanding this confirmation by appellees' own testimony in the Court below of the City's ability to make payments proposed to its tenants without the use of funds subject to any claim or lien of the Union Pacific, the Court by its finding of fact No. 34 (R. 359-60) questioned the City's forecast of its ability to pay off the bonds in 22 years, because it was based upon a 90% occupancy of the market "as compared with an actual percentage of occupancy of less than 35% at the present time." The sole basis of this assertion as to present occupancy is the testimony on May 9, 1940, of the City's witness McIntyre as to the effect of the long extended trial of this case in the Court below upon the City's operation of its market (*supra* pp. 92-3). This testimony plainly shows that the disturbance created by four months of attendance upon the trial of this case by the City officers and the 49 tenants of its market, who were joined as defendants below and charged with serious violations of Federal law prevented expected normal operation of the market. This abnormal situation constitutes no just or fair criticism of the estimates upon which the City, its bondholder, and the Supreme Court of Kansas acted in the *quo warranto* case. It may safely be asserted that a vio-

lation of the Elkins Act cannot be based on results earnestly sought by appellees through the medium of this suit and by the long drawn-out trial of the proceeding by competitive interests to whom its conduct was committed with the aim of achieving the objective referred to in the finding. It is equally certain that the alleged waiver of the bondholder's non-existent lien cannot thus be retroactively produced.

Appellees established, by their own evidence in the Court below, that the City had fully met the requirements of the Kansas statutes in promulgating a schedule of rentals sufficient to pay the principal and interest on the bonds and the expenses of the City in connection with the market. By their proof appellees have conceded the truth and accuracy of the facts before the Supreme Court of Kansas in *State ex rel. Parker, supra.* In such situation the bondholder could not complain, because obviously, the City having complied with the statute, its action in making the proposed adjustments from its Public Levee revenues was not subject to judicial interference. The bondholder having no legal right it could assert or enforce, nothing which was said by its counsel in the argument before the Supreme Court of Kansas could be construed as a waiver, because it is academic that there can be no waiver of a non-existing right.

The Kansas Supreme Court in *Mosiman* v. *Occidental Mutual Benefit Association*, 82 Kan. 670, 109 Pac. 413, l. c. 415, said:

> "A waiver is defined to be the intentional relinquishment of a known right and it implies the election of the party to forego some advantage which he might have at his option insisted upon. There must be both knowledge of the existence of the right and an intention to relinquish it."

This same definition was applied in:

Howe Scale Co. of Ill. v. *Geller, Ward & Hanser Hdw. Co.*, 285 S. W. 141 (Mo. App.).
Bertelsen & Petersen Eng. Co. v. *United States*, 60 Fed. (2d) 745 (C. C. A. 1).
Panther Rubber Mfg. Co. v. *Commissioner*, 45 Fed. (2d) 314 (C. C. A. 1).
Mengel & Bro. Co. v. *Handy Chocolate Co.*, 10 Fed. (2d) 293 (C. C. A. 1).
Oelbermann et al. v. *Toyo Kisen Kabushiki Kaisha*, 3 Fed. (2d) 5.

It is obvious that a person cannot waive a right he does not have. The existence of the right is a necessary basis of the assertion of the claim of waiver.

In *United Firemen's Ins. Co.* v. *Thomas*, 82 Fed. 406 (C. C. A. 7), the Court said, l. c. 409:

> "But manifestly there can be no waiver of a non-existing right—that which does not exist."

In *State ex rel. Driffill* v. *City of Anaconda*, 111 Pac. 345 (Mont.), l. c. 347, the Court said:

> "It is elementary that there cannot be a waiver, unless at the time it is exercised the right or privilege to be waived was in existence. In *San Bernardino I. Co.* v. *Merrill*, 108 Cal. 490, 41 Pac. 487, it is said: 'The term "waiver" or "to waive" implies the abandonment of a right which can be enforced, or of a privilege which can be exercised; and there can be no waiver unless at the time of its exercise the right or privilege waived is in existence.'"

There Was No Waiver by Union Pacific in Connection with Advance Rental Payment of $80,000 by City Ice & Fuel Company.

The Court's conclusion that, by asserted participation in obtaining the advance rental payment for use by the City in its proposed settlement, Union Pacific waived its lien upon the $80,000 so advanced (CL 12, R. 371) is again based upon the Court's erroneous conception that Union Pacific had a first lien upon all moneys received in the City's revenue account. It ignores the express language of the bond ordinance and the opinion of the Supreme Court of the state that the City was authorized to make use of advance rental payments in its proposed settlements and of its established ability to do so without the use of funds required to discharge its obligation to the bondholder. This conclusion of the District Court is plainly erroneous. Its finding that Union Pacific obtained or urged the making of the advance rental payment (FF 24, R. 355) is contrary to the evidence with relation thereto (R. 519-21, 904, 917; *supra* p. 75).

Obviously, the bondholder's right with respect to advance rental payments into the City's revenue account was no different from its right in relation to rentals paid, currently as due, or after they became delinquent. The City having fully provided for funds to meet its obligation to the bondholder, advance rentals were equally as available for the City's use for expenses as were current or past due rentals.

Since appellees' contention as to waiver by Union Pacific rested wholly on inference drawn from the conduct of its counsel in the *quo warranto* proceedings and its activities in relation to the $80,000 advance rental and not upon any express waiver, it was plainly incumbent upon appellees to establish that Union Pacific, as the bondholder, had, before the transactions relied upon, some right

which it did not have thereafter. Appellees' proof on the final hearing affirmatively establishes that after all these events occurred, the bondholder's indebtedness owing by the City was amply and fully secured thereto. No right enjoyed by the bondholder prior to the argument in the *quo warranto* proceeding or the payment of the advance rental was extinguished, impaired or modified thereby. The legal rights of the bondholder were unaffected and as a consequence no waiver can be inferred.

Upon the undisputed evidence it is clear that the advance rental payment did not operate to discharge or lessen in any way the City's obligation to Union Pacific as the holder of its revenue bonds. The trial court's own finding (FF 34, R. 359-60), based upon the City's estimates giving effect to the advance rental payment and the contemplated use thereof makes it conclusive that the City was in a position to discharge every obligation for which it had contracted with the bondholder in advance of the maturity thereof and consequently the ruling of the Court below as to waiver must be held to be without merit.

VI.

The offer by the City to make payment of the proposed adjustments out of its Public Levee revenues did not accomplish the result forbidden by either the Interstate Commerce Act or the Elkins Act because a common carrier would not thereby be caused to transport freight at less than its duly published tariffs.[1]

The undisputed evidence (*supra* pp. 77-80) disclosed that no payments were made or offered by Union Pacific to any prospective tenant of the market; that the City officers were definitely informed that Union

[1]Assignments VI, R. 384-5; VIII, IX, R. 385; XIV, XVII, R. 387-8.

who were not shippers but who induced others to receive the rebate thus accomplishing the unlawful result, had violated the statute.

Interstate Commerce Commission v. *Reichmann*, 145 Fed. 235, was a proceeding brought to compel a witness to testify before the Interstate Commerce Commission. The District Court for the Northern District of Illinois, speaking through Judge Landis, held that a private car company which owned some 9,000 cars supplied to railroads on the basis of a mileage rate for the transportation of live stock was subject to the Elkins Act and the Interstate Commerce Act and consequently required the witness to testify as to any payments made by the car company to shippers.

It should be observed that the ruling of the District Court in that case cannot be reconciled with *General American Tank Car Corporation* v. *El Dorado Terminal Company*, 308 U. S. 422, where this Court held that an owner of tank cars which were leased to a railroad company was not a common carrier subject to the Act, nor with *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, where this Court held that Armour Car Lines, which owned, maintained and leased refrigerator cars to railroads, was not a common carrier subject to the Interstate Commerce Act. In each of these cases this Court held that unless such cars were supplied directly or indirectly by a shipper so that the compensation paid by the carrier for their use resulted in a return by the carrier to the shipper of part of its tariff rates the lessor was not subject to either act.

United States v. *Koenig Coal Co.*, 270 U. S. 512, cited by the Court below, involved an indictment charging a shipper with obtaining a preference in securing cars for

Pacific could not and would not make any payment and that it would not make advance rental payments under its existing leases for that purpose. In its opinion the Court below stated that Union Pacific had informed the produce dealers that it could not pay them (*United States* v. *Union Pacific*, 32 Fed. Supp. 917).

The only offers of payment found by the District Court or disclosed by the evidence are those which the City proposed to make to produce dealers from its Public Levee funds. The Court nevertheless held that the result forbidden by the Interstate Commerce Act and the Elkins Act—that a carrier would be caused to transport freight at less than its published tariffs—was brought about.

The conclusions of the District Court may be summarized as follows:

(1) That the offering, agreeing and giving to produce dealers

> "of cash payments, free rents, rental credits and reduced rents * * * constitute a device for the offering of rebates, concessions, advantages and discriminations in violation of the Interstate Commerce Act and the Elkins Act whereby the produce dealers to whom such concessions have been offered * * * will be enabled to ship and transport freight in interstate commerce at less than the published rates on file with the Interstate Commerce Commission"

(CL 2, R. 366-7), even though such payments were to be made by the City from its Public Levee revenues as pertinent expenses of the market and the rental proposals were made respecting a public market operated by the City and in which the railroad had no interest.

(2) That the City and its officials violated the statutes in agreeing to give produce dealers concessions of the character specified in conclusion No. 2, in that

the transportation of coal during an emergency congestion of traffic, by falsely representing that the coal was for the use of a hospital entitled to priority under an order of the Interstate Commerce Commission. That the concession and discrimination was in that case practiced *by the carrier* is made clear in the opinion of the Court, l. c. 519:

> "It is asked, if this was a concession, by whom was it conceded? The answer is *by the carrier.* He granted the priority and therefore *he made the concession and gave the advantage and practiced the discrimination.*" (Emphasis ours.)

In every case in which a *carrier* has been held guilty of transporting property at less than its published tariff rates or committing an unlawful discrimination, the carrier itself has:

(1) Failed to collect its lawfully applicable published rate.

(2) Performed for favored shippers a transportation service denied to others paying the same tariff charge.

(3) Returned to a shipper a part of the published tariff rate paid by it or has accomplished that return indirectly through:

(a) Furnishing the shipper with use of property owned by the carrier.

(b) The use of money loaned by the carrier.

(c) Performance of non-carrier services.

each at less than the cost thereof to the carrier.

In every case in which *one not a common carrier* has been held guilty of violation of the Interstate Commerce Act, the prohibited result has been accomplished, with or without the knowledge of the carrier:

"* * * produce dealers to whom such concessions have been offered or given will be enabled to and will transport freight in interstate commerce by a common carrier by railroad at less than the published rates on file with the Interstate Commerce Commission and commit discriminations in violation of the Interstate Commerce Act and the Elkins Act"

(CL 3, R. 367), even though the only source of the proposed payments was the City's Public Levee revenue funds and involved no use of the funds of any common carrier.

(3) That it was a violation of the law for the produce dealers to solicit such cash payments, free rentals and reduced rentals from the City because such produce dealers would transport freight in interstate commerce by a common carrier at less than its published rates (CL 5, R. 368), although there was no evidence that the carrier did not exact and retain its full tariff charges.

(4) That the course of transactions between the City, its officers, the Union Pacific, and DeOreo and Fean constituted a subterfuge, scheme and device for soliciting, offering, giving, granting and accepting rebates, concessions, advantages and discriminations in violation of the Interstate Commerce Act and the Elkins Act whereby produce dealers to whom such concessions and discriminations have been offered will transport freight in interstate commerce by a common carrier or carriers at less than the published rates on file (CL 6, R. 369). This conclusion is obviously based on the prior conclusions noted that payments by the City out of its own funds being unlawful, any plan to accomplish that objective is likewise unlawful. The converse is true. If the payments by the City are lawful, then any plan accomplishing that purpose is not rendered unlawful though Union Pacific may have assisted it in executing the plan.

(5) Lease of warehouse and office space and cold storage plant and appurtenant facilities by a municipal corporation, associated with a rail carrier, to shippers at rentals which do not provide a proper rate of return upon the value of the facilities leased, enables the shippers to ship freight in interstate commerce at less than the published rates on file with the Interstate Commerce Commission and constitutes the giving and receiving of rebates, concessions, advantages and discriminations in violation of the Elkins Act and the Interstate Commerce Act (CL 15, R. 372-3). In contrast is the Court's ruling (CL 16, R. 373) that the rental of the cold storage plant did not constitute a rebate or concession.

By these conclusions the Court below held that the offering by the City to make the proposed adjustments out of its Public Levee revenues violated the Interstate Commerce Act, Sections 2, 4, 6 (7) and 12 (Title 49, U. S. C. A., Secs. 2, 4, 6 [7] and 12), and Sections 1 and 3 of the Elkins Act (Title 49, U. S. C. A., Sec. 41 and Sec. 43), as stated in its Conclusion of Law No. 1 (R. 366). If the proposed payments by the City from its Public Levee revenues do not produce the prohibited result, then the District Court's decree is clearly erroneous and must be reversed.

The Pertinent Statutes.

An analysis of the pertinent statutes in connection with the purposes sought to be attained by Congress in their enactment and the principles laid down by courts in decided cases, will make it clear that the payments proposed to be made by the City out of its revenues could not and did not produce the prohibited result.

Section 2 of the Interstate Commerce Act[1] (Title 49, U.

[1]Appendix p. 268.

S. C. A., Sec. 2) defines discrimination by providing t
any *common carrier* subject to the Act shall be deer
guilty of unjust discrimination who shall, directly or
directly, by special rate, rebate, drawback or other
vice, charge, demand, collect or receive from any per
a greater or less compensation for any services rende
in the transportation of passengers or freight than
charges, demands, collects or receives from any ot
person for like and contemporaneous circumstances
conditions.

Section 3 of the Interstate Commerce Act[1] (Title 49
S. C. A., Sec. 3) makes it unlawful for any *common*
rier subject to the Act to make or give any undue or
reasonable preference or advantage to any partic
person or locality in any respect whatsoever, or to s
ject any particular firm, person or locality to any un
or unreasonable prejudice or disadvantage.

Section 4 of the Interstate Commerce Act, cited by
Court, need not be discussed, because paragraph 1 of t
section relates to charges for long and short hauls
on through routes, and paragraph 2 deals with comp
tion of railroads with water routes. No question inv
ing the subject matter of this section was raised or
cided.

Section 6 (7) of the Interstate Commerce Act[2] (T
49, U. S. C. A., Sec. 6 [7]) provides that a *car*
subject to the Act shall not charge, demand, collect
receive a greater, less or different compensation
transportation of passengers or property, or any ser
in connection therewith, between given points, than
rates, fares and charges specified in the tariff filed
in effect at any time. Likewise, by this section suc
carrier is prohibited from refunding or remitting in

[1]Appendix p. 269.
[2]*Ibid* p. 269.

manner or by any device any portion of the rates, fares and charges or from extending to any shipper any privilege or facilities in the transportation of property except such as are specified in its published tariffs.

Section 12 of the Interstate Commerce Act[1] (Title 49, U. S. C. A., Sec. 12) confers upon the Commission authority to inquire into the management of the business of all common carriers subject to the Act and to initiate legal proceedings for the enforcement thereof.

Section 1 (1) of the Elkins Act[2] (Title 49, U. S. C. A., Section 41 [1]) contains prohibitions and prescribes penalties as follows:

> (a) The willful failure of a *carrier* subject to the Act to file, publish and strictly observe tariffs, rates and charges shall be a misdemeanor.
>
> (b) It shall be unlawful for any person or corporation to offer, grant, give or solicit any rebate, concessions or discrimination *in respect to the transportation of property* in interstate commerce *by any common carrier* subject to the Act.
>
> (c) Any person or corporation, *whether carrier or shipper,* who shall knowingly offer, grant, give, solicit, accept or receive any such rebate or discrimination, i. e., rebates, concessions or discriminations *with respect to the transportation of property in interstate or foreign commerce by a carrier,* shall be deemed guilty of a misdemeanor.

Sec. 1 (2) of the Elkins Act (Title 49, U. S. C. A., Sec. 1, Par. 2) provides that the act, omission or failure of any officer, agent or other person acting for or employed by any *common carrier or shipper,* acting within the scope of his employment, shall be deemed the act, *omission or failure of the carrier or shipper* as well as that of the person.

[1]Appendix p. 270.
[2]Appendix p. 266.

Sec. 1 (3) (Title 49, U. S. C. A., Sec. 1, Par. 3) provides that any person, corporation or company who *shall deliver* property for interstate transportation to any *common carrier* subject to the provisions of Sections 41, 42 or 43 (Secs. 1, 2 and 3 of the Elkins Act, Title 49, U. S. C. A., Secs. 41, 42 and 43), or for whom as consignor or consignee any such carrier shall transport property in interstate or foreign commerce, who shall knowingly by such agent, officer or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept *from such carrier* any sum or other valuable consideration as a rebate or offset against the regular charges for transportation of such property, shall in addition to the criminal penalties prescribed forfeit to the United States three times the amount or value of the rebate or offset.

Section 3 of the Elkins Act[1] (Title 49, U. S. C. A., Sec. 43) authorizes the Interstate Commerce Commission to cause a petition to be filed in a District Court of the United States having jurisdiction, whenever it shall have reasonable ground for belief that

> "any *common carrier* is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law." (Emphasis ours.)

In brief, the foregoing sections constitute regulations of *common carriers* who are engaged in the transportation of passengers or property in interstate commerce by railroad. It was the purpose of Congress in enacting these sections of the Interstate Commerce Act and the Elkins Act to require that the published tariffs of *common carriers* should be strictly adhered to.

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[1]Appendix p. 267.

The Result Prohibited by the Act as Shown by the Cases.

This Court, in *Wight* v. *United States*, 167 U. S. 512, succinctly defined the purpose of Congress in enacting the Interstate Commerce Act when it said, l. c. 517:

> "It was designed to compel *every carrier to give equal rights to all shippers* over its own road and to forbid it by any device to enforce higher charges against one than another." (Emphasis ours.)

The purposes of Congress in enacting the Act were further set forth by this Court in *New York, New Haven and Hartford R. Co.* v. *Interstate Commerce Comm.*, 200 U. S. 361, where the practice complained of consisted in the railroad's sale of coal purchased by it for resale at less than the cost to it of the coal plus its tariff rate to the point of delivery. This Court said, l. c. 391-392:

> "It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, *was to secure equality of rates as to all and to destroy favoritism*, these last being accomplished by requiring the publication of tariffs and forbidding rebates, preferences and all other forms of undue discrimination. * * * The all-embracing prohibition against either directly or indirectly *charging less than the published rates* shows that the purpose of the statute was to make the prohibition applicable to *every method of dealing by a carrier by which the forbidden result could be brought* about." (Emphasis ours.)

The purposes of Congress in enacting the Elkins Act were outlined by this Court in *Armour Packing Company* v. *United States*, 209 U. S. 56, where it said, l. c. 72:

"The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and *that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law.* It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to *to obtain or receive concessions and rebates from the fixed gates,* duly posted and published." (Emphasis ours.)

Cases Disclose No Result Condemned by Either Act.

In every case where it has been held that the Interstate Commerce Act or the Elkins Act has been violated, there has been an actual contribution *by the carrier* to the shipper, directly or indirectly, or an unlawful discrimination *by the carrier* in transportation service rendered. Only in one or the other of these situations can the result prohibited by the statutes occur. This will be shown by a consideration of the following cases:

In *Baltimore & Ohio R. Co.* v. *United States,* 305 U. S. 507, a carrier permitted shippers to occupy space in warehouses or piers owned or controlled directly or indirectly by it, at rates and charges which failed to compensate the carrier for the cost of providing the space. Here there was a contribution *by the carrier* to its favored tenants to the extent that its out-of-pocket cost exceeded the rental received.

In *Central of Georgia Ry. Co.* v. *Blount,* 238 Fed. 292 (C. C. A. 5), the Court held the law violated where a carrier leased its own land to a shipper at no rental charge

upon the obligation by the tenant to ship over the railroad's lines. This was a return *by the carrier* of part of the published rate.

In *Northern Central Ry. Co.* v. *United States*, 241 Fed. 25 (C. C. A. 2), the forbidden result was accomplished by a railroad company leasing coal land to a mining company on a royalty basis where no bona fide effort had been made by the railroad company to collect the royalty.

Vandalia R. Co. v. *United States*, 226 Fed. 713 (C. C. A. 7), involved a loan of money *by a carrier* to a shipper at a rate of interest less than the carrier paid on money borrowed by it upon the shipper's agreement to ship exclusively over the carrier's lines.

Armour Packing Co. v. *United States*, 209 U. S. 56, involved a situation where the Burlington transported freight for the packing company, charging it an agreed rate and absorbing transatlantic steamship rates which had the effect of the carrier receiving less than its published tariff.

In *United States* v. *Miller*, 18 Fed. Supp. 389, (D. C. D. Neb.) the defendant was convicted of making false statements as to the weights of shipments whereby persons other than the shipper obtained the difference between the freight charges paid by the shipper on the true weight and the lesser amount received by the carrier on the false weight. This resulted in the carrier not receiving its full tariff rate and produced the prohibited result of causing the carrier to transport property at less than its published tariff rate and therefore a violation of the Elkins Act.

In *Cleveland, C., C. & St. L. Ry. Co.* v. *Hirsch*, 204 Fed. 849 (C. C. A. 6), it was held a violation of the Act *for*

a carrier to lease land to a shipper at a nominal rental in part consideration of the lessee's promise to give all inbound and outbound freight business to the carrier.

In *Grand Rapids & I. Ry. Co.* v. *United States,* 212 Fed. 577 (C. C. A. 6), it was held unlawful for a carrier to apply existing transit rates to shipments not entitled to transit privileges and therefore subject to the higher local rates. The carrier here directly refunded to the shipper a part of the local rate.

In *Spencer Kellogg & Sons* v. *United States* (*supra* pp. 163, 170), the owner of a grain elevator who received one cent a bushel from a carrier for elevating grain transported by it, as shown in the published tariff, refunded to shippers one-half cent per bushel from the tariff allowance. Here the shippers received a part of the published tariff rates and were thereby enabled to transport grain at less than the published tariffs.

In *Seaboard Air Line Ry. Co.* v. *United States,* 254 U. S. 57, a carrier absorbed switching charges between its line and industries on competing lines, but refused to absorb such charges for shippers located on a non-competing line. Here was an obvious act of discrimination *committed by the carrier* in the rendition of transportation services whereby those shippers who were not favored with the absorption were required to pay a higher rate than those who were favored.

In *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, it was held a violation of the Act for railroads to pay a warehouse company for loading and unloading package freight at the latter's warehouse where it refused to make the same allowance to other warehouse owners.

In *Elwood Grain Co.* v. *St. Joseph & G. I. Ry. Co.*, 202 Fed. 845 (C. C. A. 8), the carrier induced another to construct an elevator on its line and agreed to pay it $1.75 per car on all grain received on its line and passing through the elevator, but did not grant such payments to the owners of other elevators. It was held that this act of the carrier constituted a violation of the law in that the payments made *by the carrier* constituted a reduction *pro tanto* of the carrier's published rates.

In *Wharfage Charges at Atlantic and Gulf Ports*, 157 I. C. C. 663, the Commission condemned the practice of a *carrier* influencing traffic upon its line by leasing a portion of its warehouse to a fertilizer shipper for two years at a total rental of $2,400 per year where one month's storage at the tariff rates would have amounted to nearly $6,000.

The authorities cited by the Court below as supporting its Conclusions of Law are of the same tenor as the cases discussed, *supra*.

In *Kansas City Southern Railway Company* v. *Albers Commission Company*, 223 U. S. 573, it was held that it was unlawful under Section 6 of the Interstate Commerce Act for a carrier to depart from its duly published tariff rates by transporting freight for a shipper under a special contract not shown in its tariffs.

Thomas v. *United States*, 156 Fed. 897 (C. C. A. 8), cited by the Court below, was a criminal proceeding charging the defendants with violation of Section 1 of the Elkins Act by getting receivers of freight to accept and receive rebates from the published rates of various railroads for the shipment of goods from New York to Kansas City. The Court held that two of the defendants

(1) By the return to the shipper, through one performing a part of the transportation service covered by the carrier's published tariffs, of part of the carrier's published rate.

(2) Through inducing the carrier to perform a service for a shipper, covered by its published tariffs, at a rate less than the rate therein provided.

(3) By inducing a carrier to perform a transportation service for one shipper to which it is not entitled under the carrier's published tariff and which, accordingly, the carrier does not perform for others.

In every case in which *one not a common carrier* has been held guilty of *causing a common carrier* to transport property at less than its published tariff rates or causing a common carrier to commit any discrimination prohibited by law, *the third person has been in a position to and has accomplished that prohibited result.*

The case here presented for the decision of this Court presents none of these situations. Not a syllable of evidence was offered in the Court below to show:

(1) That the carrier had failed to collect from any shipper its full published tariff rates.

(2) That the carrier had returned, directly or indirectly, to any shipper any portion thereof.

(3) That the carrier had performed or proposed to perform for any shipper any service of transportation not covered by its published tariffs.

(4) That the carrier had performed or proposed to perform for any shipper any different service of transportation than that which it performed and proposed to perform, in strict accordance with its published tariffs, for all.

There was no evidence that the City was in a position to cause the carrier to depart in any manner from its published tariffs with respect either to the rates or the service covered thereby. On the contrary, appellees' own evidence affirmatively established the intention and ability of the City to make the proposed payments without the use of any funds supplied directly or indirectly by the carrier (*supra* p. 89). The evidence affirmatively established, and the Court below found (FF 31, R. 358), that the City was not in a position to and did not hold itself out to perform any service of transportation, that it received no part of the carrier's published rates, that it controlled no part of the transportation service rendered by the carrier.

The case made in the Court below was one in which none of the defendants sought or intended, directly or indirectly, to produce the prohibited result. It was one in which it was definitely shown that the carrier throughout refused to permit that forbidden result to be accomplished, either directly or indirectly. It was a case in which the City and its officers, before determining to make the proposed payments, had recognized the necessity of avoiding that prohibited result, had been advised of the carrier's refusal to participate therein, directly or indirectly, and had definitely ascertained and established the ability of the City to make the proposed payments without producing the prohibited result. Its legal right to make the payments was determined in the Supreme Court of Kansas upon the basis of this proven ability. A charge that a result prohibited by law will be accomplished, unless restrained by judicial interference, cannot be sustained when the undisputed evidence establishes nothing but the deliberate intent, purpose and action of

those charged thereby to comply fully with the law and thereby rendering impossible the accomplishment of the forbidden result.

VII.

The undisputed evidence shows that throughout "the whole course of the transactions embraced in the findings of facts" the City had and exercised complete control of every phase of the development of its public market and was in no manner subject to the control of Union Pacific.[1]

There was no relationship existing between the City and Union Pacific whereby the latter could exert any control over the former in the conduct of the market.

It has been shown that Union Pacific had no legal right which was violated or threatened by the action of the City in making the settlements with its tenants and that it had consistently refused and disclaimed any intention to participate therein. The ownership of the revenue bonds conferred upon Union Pacific no right of control over the discretion of the City respecting either the rates of rental established by the City or the amounts expended for operation.

The only other contractual relationships were the team track yard lease and the lease between the City as Lessor and Missouri Pacific Railroad Company, one of the co-plaintiffs below, and Union Pacific as Lessees, covering a track on the Public Levee serving the cold storage plant, wharf and dock. By the team track yard lease the Union Pacific agreed to pay the City $10,760 per year for a term of thirty years covering approximately 24.7 acres of ground on the Public Levee, upon which the Union Pacific agreed that it would construct at its sole expense

[1]Assignments II, III, R. 383-4; XV, R. 387.

a team track yard. No control respecting the matters in question could be exerted by the Union Pacific under that lease. This is equally true with respect to the lease wherein the City was Lessor and Missouri Pacific Railroad Company and the Union Pacific were Lessees.

There was no other relationship under which it could be held that the City could be legally subjected to any control by Union Pacific. The City was free to act in the performance of its statutory authority and in so doing no violation of either Act occurred. The principle stated by this Court in *East Tennessee, Virginia & Georgia Co.* v. *I. C. C.*, 181 U. S. 1, 18, applies:

> "The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference *arising from the voluntary and wrongful act of the carriers* complained of as having given undue preference, and does not relate to acts the result of conditions *wholly beyond the control of such carriers.*" (Emphasis ours.)

That such control must be shown is illustrated by *United States* v. *Union Stock Yard, supra.* Mere "association," as that term was used by the District Court, is insufficient. *United States* v. *Union Stock Yard, supra,* mistakenly relied on by the District Court in its conclusions of law and in its opinion (32 Fed. Supp. 917, l. c. 923), makes this plain. Both the Stock Yards Company and the Junction Company were owned by the Investment Company and both rendered transportation services for which tariffs were required to be filed, but which they did not file. This Court held that the Stock Yards Company and the Junction Company were jointly

engaged in the performance of a transportation service. This Court deemed pertinent the provision of the lease (226 U. S., l. c. 303):

> "The Stock Yard Company, under the lease, still gets, however, two-thirds of the profits received by the Junction Company for performing the service in connection with the railroad transportation. This joint service now takes the place of the single service formerly rendered by the Stock Yard Company."

As to control exerted through common ownership, this Court made the following observation (l. c. 304):

> "The fact that *the performance of the service is distributed among different corporations having common stock ownership in a holding company which controls an interstate system,* was held in *Southern Pacific Terminal Co.* v. *I. C. C. supra* (219 U. S. 498), to make no difference where the service to be performed was a part of the carriage of freight by railroad in interstate commerce." (Emphasis ours.)

In concluding, this Court summarized its ruling thus (l c. 306):

> "We think that these companies, because of *the character of the service rendered by them, their joint operation and division of profits and their common ownership by a holding company, are to be deemed to be a railroad* within the terms of the Act of Congress to regulate commerce, and the services which they perform are included in the definition of transportation as defined in that Act. * * * *we think the Stock Yard Company did not exempt itself from the operation of the law by leasing its railroad and equipment to the Junction Company, for it still received*

two-thirds of the profits of that company and both companies are under a common stock ownership with its consequent control." (Emphasis ours.)

If the element of control was not essential, then it would have been unnecessary for this Court to have particularized with such emphasis.

This Court, in *United States* v. *Delaware, L. & W. RR. Co.*, 238 U. S. 516, 529, held that control by the carrier was essential, in a case arising under the Commodities Clause (Title 49 Sec. 1 [8] U. S. C. A.). This Court said, l. c. 529:

> "And, this use of one by the other—or this power of one over the other—does not depend upon control by virtue of the fact that stock therein is held by the Railroad Company or by its shareholders. For dominance of the Coal Company may be secured by a carrier (*New Haven R. R.* v. *Int. Com. Comm.*, 200 U. S. 363) not only by an express contract or agency, but by any contract which in its practical operation gives to the Railroad Company a control or an 'interest, direct or indirect' in the coal sold, at the mouth of the mines."

United States v. *Lehigh Valley RR. Co.*, 220 U. S. 257, 271-3, dealt with the Commodities Clause of the Interstate Commerce Act, but is applicable on principle that control must be exerted either through stock ownership or by contract, and in fact the two corporations treated as one before it can be said that there is any violation of the law. This Court said, l. c. 274:

> "* * * it must be held that while the right of a railroad company as a stockholder to use its stock ownership for the purpose of a bona fide separate administration of the affairs of a corporation in

> which it has stock interest may not be denied, the use of such stock ownership in substance for the purpose of destroying the entity of a producing, etc., corporation and of commingling its affairs in administration with the affairs of the railroad company so as to make the two corporations virtually one, brings the railroad company so voluntarily acting as to such producing, etc., corporation within the prohibitions of the commodities clause."

To the same effect is *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minneapolis Civic and Commerce Association*, 247 U. S. 490, 500, 501. In that case two railroad companies owned all of the stock and controlled the property and operations of a third company which operated terminal tracks and facilities. The third company caused separate switching charges to be imposed on traffic moved over the terminal tracks. It was contended by the parent companies that the third company was a legal entity separate and apart from either of them and acted independently and free from their control. In response this Court said, l. c. 501:

> "While the statements of the law thus relied upon are satisfactory in the connection in which they were used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies" (citing cases).

The necessity for control is illustrated by the decision of this Court in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, which was a

suit brought to challenge an order of the Interstate Commerce Commission, directing that the Southern Pacific Terminal Company and others desist from failing to exact from E. H. Young, a shipper of cotton seed products at the port of Galveston, Texas, wharfage charges which were not discriminatory as to other shippers. Wharves were built on land in the City of Galveston, conveyed by Collis P. Huntington, under which he reserved the right to construct wharves and terminal facilities for use by the Southern Pacific Railroad Company and Steamship Systems. The Southern Pacific Terminal Company was organized under the laws of Texas to construct and maintain wharves and docks. The Southern Pacific Company owned 99% of its stock, along with the same proportion of stock of numerous railroads comprising the Southern Pacific System. The Terminal Company entered into a lease with Young for space at the wharf for a yearly rental and upon the agreement that he would route all shipments of cotton seed and cotton seed products purchased or shipped by him over the lines of the Terminal Company and its connections, the latter constituting the railroads owned by the Southern Pacific Company. The question for decision was whether the Terminal Company, because of its control by a holding company owning a group of railroads, was subject to the Act. This Court said, l. c. 521:

> "Another and important fact is the control of the properties by the Southern Pacific Company through stock ownership. There is a separation of the companies if we regard only their charters; there is a union of them if we regard their control and operation through the Southern Pacific Company. This control and operation are the important facts to shippers. It is of no consequence that by mere charter declaration the Terminal Company is a

> wharfage company or the Southern Pacific a holding company. * * * The control and operation of the Southern Pacific Company of the railroads and the Terminal Company have united them into a system of which all are necessary parts, the Terminal Company as well as the railroad companies."

The unity of the railroad lines and the terminal facilities in a common control and ownership was held by this Court to have been recognized in the lease to Young, whereby he agreed to make all of his shipments over the lines of the Terminal Company and its connections. In this situation this Court said, l. c. 522:

> "And surely a system so constituted and used as an instrument of interstate commerce may not escape regulation as such because one of its constituents is a wharfage company and its dominating power a holding company."

Dwelling further upon the importance of control this Court said, l. c. 523-524:

> "The record does not present a case of stock ownership merely or of a holding company which was content to hold. It presents a case, as we have already said, of one actively managing and uniting the railroads and the Terminal Company into an organized system. And it is with the system that the law must deal, not with its elements. Such elements may, indeed, be regarded from some standpoints as legal entities; may have, in a sense, separate corporate operation; but they are directed by the same paramount and combining power and made single by it. In all transactions it is treated as single."

The evidence in this case is undisputed that at every stage of the market development every detail was formally

and carefully considered by the governing body of the City and that no transaction by which the City was or could be obligated was entered into without thorough consideration and formal official action (*supra* pp. 55) publicly taken and proclaimed.

The application of the principles announced in the cases, *supra,* renders inescapable the conclusion that the element of control over the City by the Railroad Company, deemed essential by this Court, not having been established and the City not being engaged in the operation of the market as an agency or instrumentality of the Railroad Company under any contract, the City has not violated the Elkins Act in proposing to make such adjustments from its revenue funds in furtherance of its statutory authority.

VIII.

There was no basis for the decree of the Court below that Union Pacific had violated the Interstate Commerce Act or the Elkins Act.[1]

Unless it was shown that funds of Union Pacific were used or intended to be used in making the proposed adjustments, then clearly the decree of the District Court holding Union Pacific guilty of violating the Interstate Commerce Act and the Elkins Act must be reversed.

Every witness called by appellees testified that Union Pacific made no offer to pay them. They understood that the payments were to be made by the City. Appellees' witness Burns testified that Union Pacific's representative Stanley told him that "there wasn't any Union Pacific money in the matter, that it was Kansas City, Kansas, money", (R. 449) and that he told Stanley that

[1]Assignments X, R. 386; XVI, XVII, XVIII, R. 387-88.

his client "wouldn't take a cent of Union Pacific money or benefit" (R. 450).

Appellees' witness Cherrito testified that Stanley told him that "Union Pacific couldn't make any allowance or pay him anything" (R. 456), and that Stanley "told him a couple of times that the Union Pacific wouldn't pay anything" (R. 457).

Appellees' witness Ziegler was informed by Stanley that the payments under discussion were to be made by the City and that Stanley "told him very positively that the Union Pacific wouldn't pay anything; that the Union Pacific couldn't even give the witness a cigarette" (R. 460).

Appellees' witness Sheehan testified that "Stanley said positively that the Union Pacific couldn't pay one red penny to anybody" (R. 472); that Kansas City, Kansas, was to pay him the money covering his damages and he was never told by anyone that any of the money was to be paid by Union Pacific directly or indirectly (R. 555).

Appellees' witness Harry Robinson testified that it was his understanding that the City was to make the adjustments (R. 569); and Si Yukon, another of appellees' witnesses, testified that "as respects adjustments Stanley informed the Committee that they were to be made by the City of Kansas City, Kansas" (R. 609).

Appellees' witness Winnick testified that "he understood that the Union Pacific Railroad Company could not and would not pay anything and that Stanley told him that he couldn't pay a nickel" and that it was his understanding that any payments would be made by the City (R. 613).

Appellees' witness Junsberg testified that DeOreo told him that he had no authority to promise anything (R.

738) but "would put it up to Kansas City, Kansas (R. 1154). He had negotiated with the City Attorney (R. 737). Appellees' witness DeMarea (R. 1153) testified he was informed that they would have to have their negotiations concerning adjustments with the City of Kansas City, Kansas.

Appellees' witness Baum testified that "he understood that the City was to make the payment; that Stanley told him payment would be made by the City, that the Union Pacific could not and would not pay him anything" (R. 1258).

Appellees' witness Marshall testified that he was advised by Stanley "that he could make no agreement for the amount of $10,000 or any other amount, but would submit the proposition to the City of Kansas City, Kansas" (R. 717); that "Stanley, Weedin or Haugh did not at any time make any offer to him; that he had not received anything from any of them" (R. 718).

Stanley testified that when he learned that the tenants were asking damages he told the City Commissioners and everyone else that the Union Pacific could not make any adjustments with tenants; that such adjustments would have to be made by the City of Kansas City, Kansas. He told the tenants on many occasions that they would have to present their claims to the City and not to the Union Pacific (R. 1048).

Haugh testified that he informed persons who inquired concerning the claims of tenants "that it was not at all possible for the Union Pacific in any way to meet any of these claims" (R. 1118). He told them "that the Union Pacific could not in any way whatsoever make any payments" (R. 1121). He told the City's Mayor that Union Pacific would not make any advance rental payments (R. 904, 1122).

The undisputed testimony thus discloses that Union Pacific made no offers of payment, but on the contrary specifically refused to do so. There was no finding of fact by the Court below that any payments or offers of payment were made by Union Pacific respecting the proposed adjustments. The undisputed evidence discloses that the revenue funds of the City were the only source of the proposed adjustments which had no connection with any tariff rate paid to Union Pacific or any other common carrier by any of the tenant shippers.

The City receives no part of the tariff rate charged shippers by Union Pacific. The City performs no transportation services for which it would be entitled to receive any part of such tariff charges. The only payments which Union Pacific makes to the City are for rental at a stipulated annual rate, wholly unaffected by tariff rates charged or collected, and the reasonableness of which rental is conceded.

In such situation, the proposed payments by the City from its revenue funds to produce dealer tenants could not result in a violation of either the Elkins Act or the Interstate Commerce Act, because a shipper would not be permitted thereby to transport freight by a common carrier at less than its published rates.

We have shown that in every case where a violation of the law has occurred, either funds of the carrier have been contributed directly to the shipper, the carrier has received less than its tariff rates, the shipper has indirectly received a portion of the tariff charge paid by him to the carrier, or discrimination has been practiced *by the carrier.*

Until the decision by the Court below no court has ever held that a violation of the Elkins Act occurs where the undisputed evidence discloses not only that no pay-

ments were made, offered, or intended by the carrier, but also that the shipper received no part of the tariff charge paid by him to the carrier, and no discrimination by the carrier in relation to either rates or service did or could result. It seems too plain for argument that no violation of either the Elkins Act or the Interstate Commerce Act could occur in this situation, because the forbidden result whereby a carrier would be caused to transport freight at less than its published tariff rates, or a shipper would be permitted to transport freight by common carrier at less than the carrier's published tariff charges could not be brought about.

IX.

The record affords no support for the finding of the Court below that any scheme, device, or subterfuge to violate either the Interstate Commerce Act or the Elkins Act was entered into by appellants.[1]

The decree of the Court below is based in part on its conclusion of law No. 6 (R. 369) that the course of transactions between the City, its officers, Union Pacific Railroad Company, and the produce dealers, constitutes a subterfuge, scheme or device for soliciting, offering, giving and granting rebates, concessions and advantages in violation of the Interstate Commerce Act and the Elkins Act, whereby produce dealers to whom such concessions and discriminations have been offered, or who have solicited the same, will transport freight in interstate commerce by a common carrier by railroad at less than the published rates on file.

This conclusion of the Court is reached despite the allegations of the Complaint and the undisputed evidence that the payments in question were to be made solely

[1] Assignments XVI, R. 387; XVIII, XX, R. 388-9.

by the City from its revenue funds and that its authority to make such use of those funds had been determined by the Supreme Court of the state in *State ex rel. Parker, supra.* It has been shown that no participation by the carrier in the proposed payments was contemplated or intended, and that the prohibited result with which the Elkins Act is concerned could not be accomplished. It is manifest, therefore, that the so-called plan had for its objective the accomplishment of a lawful result by lawful means.

Consideration of the findings of fact of the Court below makes certain that throughout the whole course of the development the parties proceeded in exact accord with all requirements of law and rejected every suggestion of any conduct which could conceivably produce the result which the Elkins Act forbids. The Court below held as elements of the plan the following:

(1) DeOreo and Fean came to Kansas City in 1937 for the promotion of a food market on the Public Levee of Kansas City, Kansas, served by the Union Pacific (FF. 9, R. 343).

Talking to those interested in the development of a food market is not within the condemnation of either Act.

(2) Union Pacific, in December, 1936, and January, 1937, for the purpose of increasing its traffic revenues from perishable products, formed a plan to have the terminal financed through the City and the Public Works Administration of the United States, so that the market buildings would be owned by the City and be free from taxation so as to give shippers in interstate commerce located at that market an advantage over others located elsewhere who are otherwise required to pay rentals in such amount as would yield a fair rate of return upon the full value of market property (FF 10, R. 343-4).

Neither Act requires municipally owned property to be rented at rates of rental satisfactory to lessors of privately owned property. Any difference in such rentals would not constitute a discrimination within either Act. The Interstate Commerce Act "does not attempt to equalize fortunes, opportunities, or abilities." *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46.

(3) Union Pacific procured plans and estimates from engineers for the food terminal and interested the City of Kansas City, Kansas, in the planning, development and construction thereof (FF 11, R. 344).

The Court treats as of no importance undisputed evidence that architects and engineers were employed by the City and paid solely from its funds (R. 789). Cooperation was rendered by an engineer of the Union Pacific in the construction of the market because Union Pacific, as the bondholder, exercised ordinary business prudence to see that funds which it loaned were providently spent. The entire construction was controlled throughout by engineers of the Public Works Administration (R. 896).

No unlawful purpose can be attributed to the parties by reason of such cooperation in the planning, development and construction of a public market. The City had express statutory power to build the market and to operate it. There is no provision in either the Elkins Act or the Interstate Commerce Act prohibiting a carrier from giving, or the City from accepting, cooperation to achieve this lawful objective.

(4) Union Pacific originated a plan involving the following elements (FF 12, R. 344-6):

(a) The market would be financed with the proceeds of revenue bonds and a Public Works Administration grant.

There was nothing novel or illegal in such a plan. Plainly, municipal financing with revenue bonds did not originate with Union Pacific. The City previously had built a grain elevator on its Public Levee with funds derived from a Public Works Administration grant and from revenue bonds which it had sold to the Public Works Administration and the latter had sold to Reconstruction Finance Corporation of the United States (*supra* pp. 24-5).

(b) Union Pacific assisted in passage of state legislation concerning the revenue bonds.

Sections 13-1242 and 13-1243, G. S. Kan. 1935,[1] granting authority to the City to lease the facilities, and prescribing the powers of the City with respect thereto were enacted in 1933 and were not amended. There is nothing in the Elkins Act or the Interstate Commerce Act which prohibits a railroad from supporting legislation to enable a municipal corporation to develop and improve its public property adjacent to, or remote from, its lines. The propriety of a legislative enactment, or of the interest of its supporters is committed to the exclusive determination of the legislature and is not the subject of judicial inquiry. The only proper inference to be drawn from such support was that both appellants intended to proceed lawfully with the market development.

(c) Failing to secure a purchaser for the bonds, it bought the bonds itself.

The evidence is undisputed that the appellant City had entered into a formal contract for the sale of the bonds to, and had a definite written commitment for their purchase by, investment bankers; that the negotiations be-

[1]Appendix p. 274.

tween the bankers and Union Pacific were initiated by the bankers and continued over many months in their effort to induce Union Pacific to guarantee the interest upon or obligate itself for rental sufficient to produce the annual interest requirement; that Union Pacific consistently refused to make such a guaranty or to extend its rental obligation beyond the maximum rate of rental prescribed by the City for the lease of its improved Levee property (R. 485-8, 496).

The finding ignores further undisputed evidence: Union Pacific's purchase of the bonds was prompted by the sudden withdrawal of the investment bankers' commitment, asserted by appellees' witness Thoron to have been unjustified and supported only by conflicting statements. The purchase was made after full investigation of the City's prospective revenues, shown by appellees' own evidence to have been more than adequate to fully repay the bonds and interest. Its intention to purchase the bonds was submitted to the Public Works Administration in writing and approved by it after full investigation. Before the purchase was completed, full disclosure was made to the Interstate Commerce Commission, both of the intended purchase and of the intended construction and operation of the team track yard, and no question has ever been raised by the Interstate Commerce Commission as to the legality of either the purchase of the bonds or the construction and operation of the team track yard (*supra* 46, 7; R. 1109-10). The only conclusion which can properly be drawn from this undisputed evidence is that both of the appellants intended to and did proceed by entirely lawful methods to circumvent the efforts of opposing interests, still seeking to prevent the construction and successful operation of a needed public improvement.

(d) Union Pacific secured a tenant for the cold storage facilities from whom Pacific Fruit Express Company and Union Pacific purchased their requirements of ice.

The undisputed evidence shows the following: For practical reasons, supply of ice from the conveniently located cold storage plant was desirable in the interests of efficiency and economy; and Union Pacific openly proposed to buy such ice requirements and those of Pacific Fruit Express Company from all the prospective lessees of the cold storage plant, provided the ice was supplied at competitive prices. It rejected the proposal made by one of appellees' witnesses, on behalf of U. S. Cold Storage Company, one of the principal opponents of the market, for "sweetening" the lease of the cold storage plant by the payment of from $3.65 to $4.00 per ton for its ice requirements as against its then current price of $3.50. No evidence was offered that the price agreed upon with the lessee of the cold storage plant—amounting, on the basis of the ice requirements for the two companies for 1939, to an average of $3.18 per ton—was in excess of the amounts paid by any appellee, or of the fair market value of the ice. Neither the Interstate Commerce Act nor the Elkins Act prohibits such a purchase. Neither Act prohibits the Union Pacific, either as a carrier or as the holder of the City's revenue bonds, from assisting the City to obtain tenants for any of its market facilities, the revenues from which provide, in part, for the payment of the bonds.

(e) Union Pacific advanced funds to leasing agents and made payments for services rendered through its subsidiary, Kansas City Industrial Land Company.

The undisputed evidence shows that advances made to leasing agents by Union Pacific, prior to its purchase of the revenue bonds, were loans repayable by said agents out of commissions to be received by them under their written contract with the City (R. 582; *supra* pp. 57-8; R. 1046-7, 1105).

The payments of $350 each to Fean and DeOreo by Kansas City Industrial Land Company, a Union Pacific subsidiary, were all made after Union Pacific had purchased the revenue bonds and the contract between the City and its leasing agents had been canceled. Neither the Interstate Commerce Act nor the Elkins Act prohibits the Union Pacific, as a common carrier or as the holder of the City's revenue bonds, from assisting the City in obtaining tenants for its market facilities. The undisputed evidence shows Fean's activities were confined to obtaining prospective tenants of the farmers' market. There is no evidence that any of these payments were participated in by any shipper, and every prospective tenant examined upon the trial testified he had been definitely informed Union Pacific would make no payments (*supra* pp. 214-5).

> (f) Defendant Union Pacific and its leasing agents carried on a campaign to procure tenants for the market.

Such conduct is not unlawful for the reasons stated, *supra*, with reference to "(e)."

> (g) It advanced sums of money for financing the preliminary expenses of the market, which the City has not yet repaid.

Prior to the completion of the market, Union Pacific advanced to the City approximately $22,000.00 for its use

to defray preliminary expenses incurred in the development of the market (R. 2234A). The undisputed evidence establishes that these advances were made on the agreement of the City to repay the same out of construction funds, and that repayment has not been made, solely because of a change in the regulations of the Public Works Administration, in November of 1938, restricting the use of such funds to expenses incurred subsequent to the grant. The undisputed evidence shows that the sums thus loaned to the City had no connection with the proposed adjustments and that neither the funds nor the benefit thereof was received by any shipper. Neither the Interstate Commerce Act nor the Elkins Act prohibits such transactions between a common carrier and a municipal corporation.

(h) Union Pacific refused to make a guaranty of the bonds sufficient to meet the requirements of Stifel, Nicolaus & Company, investment bankers, who thereupon refused to purchase the bonds.

It is undisputed that the refusal of Union Pacific to make the guaranty demanded by the investment bankers was prompted by belief of its counsel that such a guaranty was prohibited by Section 20 (a) of the Interstate Commerce Act (R. 496). Thus, undisputed evidence of Union Pacific's insistence upon observance of the Interstate Commerce Act is seized upon by the Court below as evidence of its intention to violate the same.

(i) At the suggestion of Union Pacific, an agreement was entered into between the City and De Oreo and Fean on June 16, 1938, appointing the latter as exclusive leasing agents of the City (FF 14, R. 347).

The District Court disregarded undisputed evidence that this contract was entered into after months of negotiation between the City, alone, on the one hand, and DeOreo and Fean and their counsel on the other. (p. 40, *supra*). There was no evidence that Union Pacific suggested or had any part in the negotiation of this contract. In any event, neither the Elkins Act nor the Interstate Commerce Act prohibits such a suggestion, or such a contract between the City and its leasing agents.

(j) Under an agreement made in December, 1938, between Union Pacific and DeOreo and Fean, there was paid to each of the latter by Kansas City Industrial Land Company, a Union Pacific subsidiary, $350 per month. Both of these parties were engaged in trying to lease the market (FF 14, R. 348).

It has been shown under "(e)" above that no violation of the Interstate Commerce Act or the Elkins Act was thereby involved.

(k) The City leased ground to the Union Pacific for a team track yard, and other railroads do not serve the market (FF 15, R. 349).

This finding wholly disregards the plain terms of the lease (R. 2171) under which Union Pacific is required to switch the cars of all carriers entering Kansas City without discrimination, under duly published tariffs concurred in by all of the railroads, including appellee railroads (R. 2171). There is no evidence that any other railroad sought to make the investment in rail facilities required to serve the City's market.

(l) It has been the purpose and intention of the City and Union Pacific to induce produce dealers to move from the Kansas City, Missouri, market to the Kansas City, Kansas, market and to accomplish such pupose they have been ac. ely engaged in soliciting such tenants (FF 18, R. 350).

Neither the Elkins Act nor the Interstate Commerce Act renders the appellee Kansas City, Missouri, immune from competition of another city in the conduct of its public market. The finding ignores the undisputed proof that prior to any activity of appellants, appellee Rock Island had induced the removal of one of the largest dealers on the Missouri market to its local freight station, directly served by its trackage (p. 95, *supra*); that the market facilities of appellee City were wholly inadequate; their location undesirable and productive of large expense and waste; that appellee City definitely refused to improve conditions, notwithstanding the offer of appellant City to abandon its market proposal, if such appellee would do so; that officers of appellee City advised it would not oppose construction of the new Kansas market and took no steps to improve the condition of the Missouri market (p. 33, *supra*) until after the appellant City, by its acceptance of the grant from the Public Works Administration, had obligated itself to construct its market and Union Pacific had purchased the City's revenue bonds (p. 86, *supra*). Neither the Interstate Commerce Act nor the Elkins Act prohibits a common carrier from soliciting removal of any industry to locations served by its lines.

(m) As early as August 7, 1937, Union Pacific contemplated the necessity of giving inducements to produce dealers either by direct payments or by buying properties from them which it did not want.

Based, as the finding is, wholly on a report of an agricultural agent of Union Pacific in August, 1937, it will be found to reflect partial extracts of two widely separated sentences in a five page report (Pl. Ex. 14, R. 1989; offered, R. 419). The first, speaking of the trade as evidenced by experiences at Cleveland, Buffalo, and Albany, stated (R. 1989):

> "They will go where the larger volume is handled, the costs are lower and the facilities better or if they are paid for going."

The second (R. 1991) is as follows:

> "The railroad should be prepared to and might have to buy unwanted properties in order to make certain and secure the investment in the new food terminal tracks and facilities."

The undisputed evidence plainly shows that whatever consideration was given by Union Pacific officers to these statements resulted in a determination that Union Pacific would neither pay dealers for moving nor purchase unwanted properties to induce them to do so, or to protect its investment (pp. 77-80, *supra*), but the statements are none the less seized upon as evidence of an intention on the part of both appellants to violate the law.

> (n) In the Summer and Fall of 1937 the defendant DeOreo induced certain named individuals to serve on Merchants' Committee for the promotion of the food terminal and agreed to pay each of them $5,000 for services and for occupancy of said food terminal.

The evidence discloses that this transaction had no relation to or connection with the statements of the report

just mentioned or with the subsequent plan of the City as to settlement with its tenants. The undisputed evidence shows that at that time DeOreo and Fean were seeking to promote the market as a private venture of their own, to be operated under a lease from the City (pp. 29, 30, *supra*) and that neither Union Pacific nor the City had any part in the selection of the committee or knowledge of the contractual arrangement between Fean and DeOreo who were represented by their own counsel, and the members of the committee (R. 1032).

(o) "By August, 1938," Union Pacific officers, employees, and agents had negotiated with other produce dealers with respect to cash payments and other inducements to move to the new terminal.

The sole basis for this assertion is shown by specific record reference to be the testimony of the appellees' witness Bevington, a special investigator of the Public Works Administration, who testified that Sheehan had made a statement to him, written out in longhand, "that representations were made to him that in the event of his taking space in the Kansas City, Kansas, market the Union Pacific would, on a valuation of $20,000 as to the present worth of his present lease and improvements thereon, give him a rent credit in said sum on a thirty-year lease." The finding ignored the testimony of Sheehan denying any such representation was made to him or that he had ever given any written statement to Bevington (p. 43, *supra*), the undisputed evidence that no such proposal was ever made to Sheehan (p. 43, *supra*), and the fact that Bevington's report was filed with the

Secretary of the Interior and thereafter the Secretary approved the pending application for the City's grant.

(p) The Executive Assistant of Union Pacific negotiated with produce dealers for free rentals, reduced rentals, free advertising, free refrigeration, unsecured and inadequately secured loans (FF 19, R. 352).

This finding overlooks the undisputed evidence, as found by the Court below in its opinion of March 25 (32 Fed. Supp. 923), that Union Pacific's representative informed every produce dealer with whom any discussion as to rental adjustments was had that Union Pacific could not and would not make any such adjustments (pp. 77-80, *supra*); that the City had, by formal ordinance, prescribed the terms of the Founder's Lease and the basis of rental upon which it was willing to lease the market facilities (R. 797). By its ordinance adopting the form of the lease, the City expressly required the submission of applications upon this form and required that before the same should become binding upon the City it should be formally approved by its governing body (pp. 61-2, *supra*).

Frequent references throughout the Court's findings to "free and reduced rentals" are without foundation. All negotiations for renting the market were on the basis of the City's Founder's Lease. No "free" rental is provided for in the City's prescribed form of lease. The rental reserved was to start 30 days after notice by the City of the completion of the facilities, for the first three months at $50 per month, per unit, and for the remainder of the term of any lease at $150 per month per unit. Plainly, its provisions were designed to secure for the

City an average rental of $125 per month during the first year of occupancy and $150 per month thereafter. Upon the basis of K. C. K. Ex. 229 (R. 3047; offered, R. 949), which gave full effect to these provisions of the lease in the calculation of rental, the Court below specifically held the rentals so prescribed were more than adequate to meet the City's full obligation to the bondholder, pay all of its expenses, including the proposed adjustments, and yield a surplus to the City (FF 34, R. 359-60). Under these circumstances the provisions of the City's lease cannot be distorted into any proposal of either "free or reduced" rental.

The undisputed evidence shows that the only advertising discussed was the radio program which Union Pacific sponsored and which, by its contract and the testimony of the appellees' own witnesses, was confined to the advertising of Union Pacific's rail facilities (*supra*, pp. 82-3).

The undisputed evidence shows that discussions with respect to "free refrigeration" related only to whether such refrigeration was included in the established rental. At the time of such discussions neither the form of the Founder's Lease nor any other action of the City had prescribed an additional charge for refrigeration. (K. C. K. Ex. 229, R. 3047; offered, R. 949) relied upon by the Court in its finding of fact No. 34 (R. 359-60) establishes that the City could have absorbed the cost of providing refrigeration, as it did absorb the cost of air conditioning the office units, in the established rental and still meet its full obligation to the bondholder and pay all expenses, including the proposed adjustments.

The undisputed evidence shows that specific request was made by appellant City that Union Pacific should assist in obtaining signatures to the City's prescribed

form of lease, to be submitted to its governing body for its consideration (p. 61, *supra*). The record affords no foundation for finding that any activity of any agent of Union Pacific in soliciting or obtaining execution of the City's prescribed form of lease constituted any offer, either from Union Pacific or from the City, of "free rentals," "free advertising," or "free refrigeration."

There was no evidence that, in any discussion with respect to bank loans, any offer of "unsecured or inadequately secured" loans was made. By its finding of fact No. 20 (R. 353) the Court specifically found that the loans made by the bank were not unsecured or inadequately secured.

> (q) Union Pacific proposed and urged City Ice & Fuel Company to make a deposit of $25,000 to guarantee bank loans, acting in concert and conspiracy with the defendant City and its officers (FF 24, R. 355).

This finding is contrary to the undisputed evidence that neither the City nor Union Pacific had any part whatever in proposing or urging City Ice & Fuel Company to make its guaranty to the Riverview State Bank. It was shown by the undisputed testimony of the appellees' own witnesses, not parties to this proceeding, that the arrangements for that guaranty were made solely between an officer of the bank and officers of City Ice & Fuel Company without any participation by either the City or Union Pacific, and that the Bank had no other guaranty (p. 82, *supra*). It is undisputed that the loans were neither made nor guaranteed in any way by either appellant. That the loans made by the Bank were not unsecured or inadequately secured is ex-

pressly found by the Court in his finding of fact No. 20. In its opinion (32 Fed. Supp. 926), upon the basis of the whole evidence in the present record relating to such loans, the Court specifically held that the loans made by the Bank were not violations of the Elkins Act.

> "Although the testimony discloses that many loans have been made by that bank to prospective tenants, it does not show that these loans were made at lower rates of interest than customary, or that it was not the intention of the borrower to repay the loans * * * There was evidence tending to show that one of the loans may have been somewhat inadequately secured, but the testimony does not warrant the conclusion that the loan constituted a concession. It is not a violation of the Elkins Act for the bank to make ordinary loans."

The analysis thus made of the findings of fact upon which the Court rested its conclusion that appellants had entered into a plan, scheme or subterfuge to violate both Acts makes it plain that the Court's conclusion is negatived by its own findings which, in the light most favorable to appellees, disclose that the purpose of the parties throughout was the accomplishment of a lawful objective by lawful means. There was no departure by a common carrier from published tariffs. Neither was there any unlawful discrimination by a carrier. It follows that no result forbidden by either the Elkins Act or the Interstate Commerce Act was intended or accomplished.

X.

The City, the Union Pacific and the other defendants in the Court below did not enter into any conspiracy to violate the Interstate Commerce Act or the Elkins Act, because the objective sought to be attained being lawful, any understanding or cooperation which might have been given to effectuate such lawful purpose was not a violation of either Act.[1]

The Court below held that the "whole course of transactions embraced in the findings of fact" which we have discussed in detail in Point IX of this brief (pp. 217-233, *supra*) constituted a conspiracy on the part of all the defendants to violate the provisions of the Interstate Commerce Act and the Elkins Act "against offering, giving, granting, soliciting, accepting and receiving rebates, concessions, advantages, and discriminations whereby the favored produce dealers will transport freight in interstate commerce by a common carrier or common carriers at less than the published rates on file" (CL 7, R. 369). Unless the purposes and objectives sought to be attained by such concerted action were those forbidden by either Act, then no conspiracy exists. In *Pettibone v. United States*, 148 U. S. 197, 203, this Court defined a conspiracy:

> "A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means * * *."

The facts on which the Court predicated its conclusion as to the existence of a conspiracy, being the same as those upon which it based its holding that the City, the

[1]Assignments XVI, R. 387; XVIII, R. 388; XXIV, R. 389.

Union Pacific and other defendants in the Court below had entered into a subterfuge, scheme, or device (*supra* pp. 217-233), need not be repeated here.

From these facts it appears that the acts performed by the City and the Union Pacific, as found by the Court, with reference to the City's proposed payments to produce dealers, were all directed toward the use of the City's Public Levee revenues upon which Union Pacific had no lien or claim. It follows there is no conspiracy to violate either Act, because the result forbidden therein was not and could not be accomplished for the following reasons:

(1) The City had express statutory authority to make the payments from its Public Levee revenue funds, free from any control, direction, supervision or hindrance by the Union Pacific as the bondholder or anyone else.

(2) No funds of the Union Pacific were used or intended to be used in making such payments.

(3) The City is not a common carrier subject to either the Elkins Act or the Interstate Commerce Act.

(4) The payments proposed to be made by the City would have no relation to or effect upon any tariff rate paid by a shipper to a common carrier.

(5) No departure from the published rates of a carrier and no discrimination by a carrier would be produced thereby.

The principles discussed in cases cited by the Court below as supporting its conclusion of an unlawful conspiracy have no application. In *Goode* v. *United States*, 58 Fed. (2d) 105 (C. C. A. 8), it was held that a conspiracy to violate the National Prohibition Act might be proved by circumstantial evidence. It was held that the defendant Goode was guilty of conspiracy because of his presence when and knowledge that intoxicating liquors

were being sold on premises. Similar is *Devoe* v. *United States*, 103 Fed. (2d) 584 (C. C. A. 8), where the defendant was charged with conspiring to injure and oppress citizens in the exercise of their rights of suffrage secured to them under the Constitution and laws of the United States. It was held that transactions between the defendant and others charged with a violation of the law were admissible on the issue as to whether a conspiracy existed. Pertinent rules concerning the admissibility of evidence tending to show the existence of a conspiracy were applied by the court. Also not in point is *United States* v. *Gooding*, 12 Wheat. 460, cited by the Court below, which was an indictment charging violation of the Slave Trade Act of 1818 by engaging in the slave trade. No question of conspiracy was involved.

We, therefore, respectfully submit that the ruling of the District Court that the acts done and performed by the City, Union Pacific and the other defendants in the Court below, constituted a conspiracy to violate the Elkins Act and the Interstate Commerce Act, is utterly without factual or legal support because the objectives sought to be obtained by the parties, as found by the Court, were in all respects lawful and did not have for their purpose the accomplishment of any result forbidden by either the Elkins Act or the Interstate Commerce Act; nor were those lawful objectives sought to be accomplished by any unlawful means.

XI.

The Court below erred in permitting alleged losses to appellee railroads of traffic revenue upon "competitive traffic" to be made a controlling element in the conduct and disposition of the case.[1]

As early as September 16, 1938, while appellant City's application for a grant was pending, the President of appellee Santa Fe, in writing, advised appellant McCombs that the plan of the appellant City for the construction of its market would result in its location on one of the 13 railroads serving Kansas City, "to which the other railroads would have access only through a switching arrangement" and that *"The Santa Fe and Union Pacific are direct competitors for most of the perishable traffic entering Kansas City from the west,* and the location of a produce terminal exclusively on one of these lines * * * would give a tremendous advantage to the line serving the terminal *in securing business from the origin territory"* (R. 3023, *supra* p. 84).

Precisely that advantage was possessed by the Santa Fe, as to traffic from the west, by the location of the Chicago Produce Terminal exclusively on its line, whereby Santa Fe was enabled to obtain, not only this advantage in solicitation of traffic, but also its own maximum long haul through Kansas City to Chicago (R. 701-2, *supra* p. 84).

On December 1, 1939, two days before the opening of City's market, the President of the Burlington, as spokesman for the four appellee railroads, rejected a proposal to negotiate with Union Pacific for joint rail service at the market because of *"the soliciting advantage that the Union Pacific would have in the West"* (R. 970, 1124; *supra*

[1]Assignments III, R. 383; IV, R. 384; VII, R. 385; XIII, XIV, XV, R. 386-7; XVIII, R. 388; XXI, R. 389.

p. 86). On the same day the appellee railroads and appellee City announced their intention to construct a competing terminal in Kansas City, Missouri (Pl. Ex. 13, R. 1949; offered, R. 418; *supra* p. 86). On December 19, the Kansas attorney for appellee Santa Fe, on instructions of its General Solicitor at Chicago, attended the hearing of *State ex rel. Parker* v. *Kansas City* in the Supreme Court of Kansas (R. 662-3; *supra* p. 74). The *per curiam* decision of the Court was rendered on December 21 (151 Kan. 1; 98 Pac. [2d] 101). On December 22 the Interstate Commerce Commission, upon consideration of a Bureau of Inquiry memorandum of the same date, requested the Attorney General to institute this action (Pl. Ex. 52, R. 2426-7; offered, R. 433; *supra* p. 86). On December 26th and 27th, Marsh, an investigator of the Interstate Commerce Commission, examined Union Pacific files at Omaha (R. 433; *supra* p. 86). The complaint was filed December 29, accompanied by affidavits of Hurd, Santa Fe attorney (R. 72); Fitzgerald, traffic officer of the Santa Fe (R. 83); Curran, traffic officer of the Burlington (R. 85); Meade, traffic officer of the Rock Island (R. 87); Watson, traffic officer of Missouri Pacific (R. 88); Hart, traffic officer of the Burlington (R. 89; *supra* p. 86) and of Marsh (R. 74; *supra* p. 86). The complaint specifically named the four appellee railroads, charged that substantial damage would be done to them if the alleged plan were carried out, and that it would result in the diversion of shipments of freight from the lines of other railroads to those of Union Pacific (R. 9). It alleged, on information and belief, that the sum of $111,850 in cash, with which to make the City's proposed payments, was being contributed directly or indirectly by Union Pacific or

advanced on the basis of credit supplied by Union Pacific. These allegations obviously were not the product of the Commission's investigation, shown by the Marsh affidavit. Neither were other charges of law violation in the complaint.

Simultaneously with the filing of the complaint, counsel for the Interstate Commerce Commission requested that the four appellee railroads, with the appellee City, be made parties plaintiff (R. 400; *supra* p. 87). The application was renewed January 3 and granted (R. 400; *supra* p. 87). It may well be inferred that the Commission thus sought to place responsibility for proof of serious violations of Federal law alleged in the complaint, which its own brief investigation had not disclosed, upon the evident source of the charges. The wisdom of such a course could scarcely be questioned in the light of the fact that the Commission's later and thorough investigation (Pl. Exs. 2 to 49) demonstrated the absence of reasonable grounds for the charges made. After some misgiving lest joinder in the application for a temporary injunction might subject the appellee railroads to the liability of posting a bond (R. 402) had been relieved by the Court's comment upon the right of the United States to proceed without bond (R. 402), all of the appellees joined in the allegations of the complaint and the prayer for relief (R. 411-12). The motion of Union Pacific to vacate the Court's Order of January 3 permitting such joinder was overruled (R. 184). The whole record demonstrates the leading and dominant part played by appellee railroads in the conduct of the proceeding.

By the testimony of a traffic witness each of the appellee railroads sought to show the amount of traffic revenue which would be lost to it upon perishable

traffic, expressly designated as being "competitive," and each of these witnesses re-echoed, as the basis of his estimate, the "soliciting advantage" from the location of shippers on a carrier's line (*supra* p. 53). The traffic witness of the appellee Rock Island, as the basis for an estimate of a possible loss of 2,000 cars of "competitive traffic," even included traffic originated by appellant Union Pacific in Idaho and *obtained by the Rock Island only by its own solicitation at Denver.*

By the Court's finding of fact No. 36 (R. 361), given in the exact language of the appellee's request, this novel doctrine that observance of the Interstate Commerce Act and Elkins Act is to be enforced in the interest of preserving to the appellee railroads an advantage in the solicitation of competitive traffic is plainly recited.

> "The new Kansas City Food Terminal in Kansas City, Kansas, is *located solely on the lines* of defendant Union Pacific Railroad * * * and said defendant has *an advantage over the above named competing lines* with respect to traffic handled to or from said new Terminal, *for the reason that a railroad on whose line a shipper is located enjoys a substantial advantage in the solicitation of competitive traffic.* If the defendant produce dealers are induced to move * * * the result will be to *divert shipments of produce traffic* * * * *from said competing lines* to the lines of the defendant Union Pacific." (Emphasis ours.) (FF 36, R. 361.)

The exact estimates of appellees' traffic witnesses are then adopted, and the finding concludes:

> "And said loss and diversion will be a continuous one and one for which there is no adequate remedy at law."

The "above named competing lines" are expressly identified as being the appellee railroads.

Repeated references are made in findings of fact of the Court below followed by conclusion of law No. 14 (R. 372), that the acts of officers of Union Pacific were undertaken and performed *for the purpose of increasing its freight traffic.*

The controlling effect given by the Court below to this emphasis upon the location of an industry on the line of a single railroad is again reflected in its opinion (32 Fed. Supp. 917) in which the Court completely ignoring the determination of this Court in *United States* v. *Union Stock Yard, supra,* that the payment involved in that contract in that case was to be *made by a carrier,* sought to bring the doctrine of the case to bear upon the appellant City, *solely by reason of the physical location of its market* in relation to the rail facilities of Union Pacific (l. c. 925).

> "The applicability of the Stock Yards case should become apparent. If, in that case, the contractual requirement that acceptance of the payment necessitated transportation was sufficient, coupled with interest indicative of intent, to so connect that payment with transportation that the concession was with respect to transportation, so must the requirement resulting from the type of the facilities, that the tenants of the facilities of the market here involved engage exclusively in interstate transportation over the lines of the Union Pacific, coupled with the intention of the City that they should do so, produce the result that the payments about to be made to those tenants are in respect to transportation. There can be no difference in principle between a contractual requirement and a requirement growing out of absolute necessity. *The proposed payments* are so definitely intended to be in connection with interstate transportation and *are by all the physical*

facts so necessarily connected with interstate transportation that they are in 'respect to transportation.'' (Emphasis ours.)

Section 3 of the Elkins Act (Title 49, U. S. C. A., Sec. 43)[1] was not designed to be made an instrument for the suppression of lawful competition because: (1) it can only be invoked upon proof that a common carrier is transporting property at less than its tariff rates, or that a common carrier is committing an unlawful discrimination; and (2) the only decree authorized is one *to enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination.*[2] The contention advanced by appellees below, and apparently accepted by the Court, that Section 3 authorizing the Court "to make such other persons or corporations parties thereto *as the Court may deem necessary*" was sufficient warrant for their participation in the proceedings as plaintiffs, was plainly inconsistent with the creation of the right solely in the Attorney General of the United States. In any event, it may safely be asserted that participation of appellees under authority of the Court below did not have the effect of broadening the Complaint nor add to the enumerated powers of the Court. (*Terminal Warehouse Co. v. Pennsylvania Railroad Co.*, 297 U. S. 500, l. c. 508-9). The sole authorized objective of the action was the enforcement of the published tariffs of a carrier, not the preservation of any "soliciting advantage in the west" then had by any of the appellee railroads.

No provision of the Interstate Commerce Act or the Elkins Act prohibits lawful competition between carriers, provided their lawfully published tariffs according equal

[1]Appendix, pp. 267-8.
[2]*N. Y. N. H. & H. v. I. C. C.*, 200 U. S. 361.

rights to shippers be fully complied with. This is the first case where the Elkins Act has been employed as a means to restraining lawful competition fostered not only by the Interstate Commerce Act but also by other Acts of Congress. Thus in restraining competition the Court below has brought about a result condemned as unlawful (*U. S. v. Union Pacific,* 226 U. S. 61, 87). That a carrier may lawfully solicit traffic from competing railroads and enter into business arrangements with shippers by which the benefit of such traffic is withheld from their competitors, without violating either the Interstate Commerce Act or the Elkins Act, is established in *Kerr* v. *Southwestern Lumber Co. of New Jersey,* 78 Fed. (2d) 348 (C. C. A. 5). Appellee Santa Fe, through one of its wholly owned subsidiaries, loaned a shipper more than 12 million dollars over a period of 30 years. Under written agreements the Santa Fe purchased the shipper's railroad property and agreed to purchase its requirements of railroad ties from the shipper. Through its subsidiary the appellee financed the shipper in the purchase of large tracts of timberland to be developed by extensions of the appellee's line, and by written contract the shipper agreed not to permit the lines of any other carrier to serve any of its plants. The common stock of the shipper corporation was held as collateral for the payment of the loans, and by written contract the amount of timber to be cut and marketed was controlled by unanimous vote of the board of directors of the shipper, upon which the appellee was represented by two members.

As the result of these arrangements the appellee obtained substantially increased traffic revenues, avoided the competition of other carriers, and purchased from the shipper large supplies of ties. It was held, that, not only did the facts proven fail to establish a joint

venture between the appellee and the shipper, but also that the lawful objective of the appellee in the increase of its traffic was accomplished without any violation of either Act, because the price paid by it to the shipper for ties was a reasonable one and the interest paid by the shipper for the loan was at a lawful and customary rate.

That it was not the objective of the Interstate Commerce Act to prohibit competition between carriers was plainly shown by reports and debates in Congress on the passage of Transportation Act 1920, amending the Interstate Commerce Act. The report of the Senate Committee on Interstate Commerce, recommending passage of the Act, contained this language:

> "* * * Competition, not in rates or charges but in service, will do more to strengthen and make public regulation successful than any other element which can be introduced into the business of transportation. Honorable rivalry among men is the most powerful stimulus known to human effort * * *." (Report No. 304, 66th Congress, 1st Session, p. 12.)[1]

That the provisions of the Interstate Commerce Act and Elkins Act did not override the mandate of the anti-trust laws which impose a duty of competiting upon carriers is shown by *U. S.* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 337, and *U. S.* v. *Union Pacific*, 226 U. S. 61, 87. See also:

U. S. v. *Joint-Traffic Association*, 171 U. S. 505.
U. S. v. *Southern Pacific Company et al.*, 259 U. S. 214.

[1]See also 59 Cong. Rec. p. 132,
59 Cong. Rec. p. 221,
59 Cong. Rec. p. 467.

Finally, the prospective loss of traffic revenues to appellee railroads could not properly be made the basis of relief to them or to the United States herein, for the obvious reason that both by the allegations of the Complaint and the appellees' own testimony, it was definitely asserted that the loss would result solely because of the status of the appellees as competitors with the appellant Union Pacific in the handling of perishable traffic from the West, and appellees' own estimates of that damage are based wholly upon this "competitive traffic." By the very assertion of the alleged right of the appellee railroads to "competitive traffic," all of the appellees inescapably concede the equal right of Union Pacific in the same "competitive traffic."

XII.

The Court below was without power to restrain the appellant City from the exercise of the authority conferred upon it by the Statutes of the State or to compel it to establish rates of rental for its market facilities which would yield a rate of return prescribed by the Court upon the Court's valuation of the market facilities, including the Public Levee land and improvements constructed with federal funds donated by the Public Works Administration of the United States.[1]

By Its Final Decree, the Court Below Usurped Powers Expressly Conferred Upon Appellant City by the Statutes of the State, Contrary to Its Own Findings and Conclusions and to Settled Principles of Law.

Upon final hearing and over the objection of the appellant City (Assignment 26, R. 391-5) elaborate exhibits and testimony of witnesses from the Bureau of Valuation of the Interstate Commerce Commission were offered by

[1]Assignments IV, V, VI, VII, R. 384-5; IX, R. 385; XIII, XIV, XV, R. 386-7; XXI, R. 389; XXV, R. 389-90.

the appellees and received in evidence. From these the Court below fixed a specific value or rental base to the market improvements constructed by the City, in accordance with the method pursued in *Minnesota Rate Cases*, 230 U. S. 352 (FF 38, R. 362-3), including the Public Levee land, at 50 cents per square foot, or $21,780 per acre (Pl. Ex. 271; R. 3321; offered, R. 1213; *supra* p. 87). This "full value" of the Public Levee land was included in the total value fixed by the Court *"for the purpose of determining rentals"* required to prevent violation of the Elkins Act and Interstate Commerce Act.[1]

Appellees sought the judgment of the court below that "the proportionate part of the property represented by funds contributed by the Public Works Administration of the United States to the cost of construction must be included" in such value[2] and the Court below held:

> "The fair value of the property will be used in determining the rate of return. The source of the invested capital and whether that capital was *borrowed or was donated* will not affect the fair value." (C. L. 21, R. 375.)

Upon the assertion that a net return of 6% after depreciation was required to avoid the alleged violations, appellees undertook to prohibit the City from leasing its market facilities, except upon the basis of a rental of $200 per month for produce units, $1.50 per square foot for office space, and $70,000 per annum for the cold storage plant.[3] All of these findings and conclusions were sought upon the basis of the City's "association with a common carrier" in the enterprise.

Appellees' own calculation of the rate of return

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[1] C. L. 21, R. 375.
[2] Appellees' C. L. 2, R. 324.
[3] Appellees' F. F. 42, R. 319.

reasonably to be expected upon the basis of the City's prescribed rates of rental, introduced by an expert accounting witness of appellee Santa Fe (Pl. Ex. 286, R. 3464; offered, R. 1269) established that the City would receive from rentals a net return equivalent to 2.03% upon the cold storage plant, 3.60% upon the four produce buildings, and 2.82% for the land leased to Union Pacific for the team track yard, or a combined net return to the City of 2.83% after depreciation upon the value thus assigned to its market facilities, including its rental from the team track yard.[1]

Confronted by appellees' asserted application of the Elkins Act as to the future level of the City's market rentals, appellants offered evidence that the wholesale buildings in the newly constructed market of the appellee Kansas City, Missouri, have, subsequent to April 15, 1940, been rented at from $40 to $75 per month. Evidence was also offered as to the cost of the appellee City's market, exclusive of the publicly owned land on which it was built, and the net return to the appellee City of 1.15% of its total investment (U. P. Ex. 362, R. 3820; offered, R. 1381; *supra* pp. 93-4).

Similarly, it was shown that appellee Rock Island had leased a substantial portion of one of its freight houses to a produce dealer for the conduct of a large wholesale produce business and the receipt of shipments in interstate commerce by rail. The building was directly served by trackage of appellee Rock Island and equipped with banana, celery and tomato rooms and refrigeration. Under its lease appellee Rock Island derived a net return of 1.94% per annum upon its recorded investment as reported to the Interstate Commerce Com-

[1] F. F. 40, R. 364.
Appellees' C. L. 18, R. 331-2.

mission, including the Commission's valuation of land but before any deduction for depreciation, heat, water, maintenance, and repairs and taxes borne by the appellee (U. P. Ex. 392, R. 3887-8; offered, R. 1423; *supra* pp. 95-6).

By other evidence it was shown that each of the appellee railroads leased elevators owned by them in Kansas City to shippers in interstate commerce at rates of rental producing either a deficit or a nominal net return before depreciation (U. P. Ex. 391, R. 3886; offered, R. 1422; *supra* p. 96).

This evidence was received subject to the objections of the appellees, but the appellees clearly waived any objections thereto by seeking the judgment of the Court finding that by reason of orders of the Interstate Commerce Commission as to transit privileges at Kansas City and activities of the United States itself, in the Federal agricultural program and inland waterway improvement, the rental value of the elevator properties had become depressed so that neither the Interstate Commerce Act nor the Elkins Act required any net return thereon.[1] These findings, the court below declined to give.

By appellees' requested conclusion, given by the Court below (C. L. 16, R. 373), they obtained a determination that the Elkins Act is susceptible of two entirely opposite interpretations. Under the one, wholly-owned carrier facilities may be leased at little or no return. Under the other, new facilities, either carrier-owned or constructed "in conjunction with others," may not be leased to shippers without exacting rentals which will yield a net return upon the cost or value of such facilities. These inconsistent conclusions were drawn, at the appellees' request, from the decision of this Court in *B. & O. Railroad* v. *United States*, 305 U. S. 507, in

[1] Appellees' F. F. 43, 44, 46, 50, R. 319, 320-1, 323.

disregard of the fact that the carrier-owned facilities there involved were both new and old, and that the order of the Interstate Commerce Commission under review in that case imposed precisely the same requirement as to all.[1]

Neither that case nor any of the cases cited and relied upon by the appellees or the court below involved rates of rental of a municipally owned public market or of any property except that supplied by a carrier for the use of shippers.

The Court below, however, rejected the appellees' contention, also advanced upon authority of *B. & O.* v. *United States*, that a 6% net return above depreciation was required to prevent violations of the Elkins Act, even by a municipal corporation "associated with" a common carrier, and specifically held:

> "Under the circumstances of this case, the leasing of the facilities of the Kansas City Food Terminal at present rentals does not result in rebates and concessions in violation of the Interstate Commerce Act and the Elkins Act" (C. L. 16, R. 373).

The Court held[2] that the rate of return shown by plaintiffs' Exhibits 286 (R. 3464; offered, R. 1269) and 287 (R. 3466; offered, R. 1271), upon the basis of rentals established by the City as shown in K. C. K. Exs. 228 (R. 3044; offered, R. 947) and 229 (R. 3047; offered, R. 949), including the proposed payments to tenants, described as intended to provide for the amortization of principal and interest on the revenue bonds held by the Union Pacific, representing 55% of the total cost of con-

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[1] "To meet the requirements of this competition, the various Port of New York railroads added many *new buildings in recent years.*" 305 U. S. 507, 517.

[2] F. F. 41, 42, R. 364-5.

struction and "to compensate the City for the use of the facilities for the purpose to which they are dedicated" was compensatory and *did not result in any violation of the Interstate Commerce Act or of the Elkins Act.* From this determination no appeal was prosecuted by the appellees.

The Court brushed aside the giving of free rents or inadequate rents by the appellee Kansas City, Missouri, to tenants of its municipally owned market buildings and the practice of the appellee railroads in relation to elevator rental as immaterial.[1] In its memorandum opinion on final hearing[2] the Court definitely stated:

> "The Court has no power to fix permanent minimum rental rates, even until further order of the court. It may only enjoin rebates or concessions conferred by inadequate rates. While it may forbid the offering of such rental advantages as will constitute rebates or concessions, rate making is not a proper prerogative of the court."

Nevertheless, by its final decree, the Court below enjoined the City from permitting the occupancy of its produce buildings or other facilities by shippers unless such tenants "shall pay rental *hereafter* * * * *at the same rate charged all other shippers occupying similar facilities* * * * and which *will yield a proper rate of return upon the full value of the market facilities as a whole after making provision for all expenses of operation, including maintenance and depreciation.*"[3] By further provision of the final decree, the appellant City was required to file with the Clerk of the Court monthly

[1] C. L. 23, 24, R. 375-6.
[2] 24 Fed. Supp., l. c. 6.
[3] Final Decree, R. 379.

written statements showing all rental payments made by tenants occupying facilities, and it was definitely provided:

> "that this permanent injunction shall remain in full force and effect until further order of this court. That future proper requests or petitions for modification of this decree may be made by motion in this cause," (R. 381).

Thus, in the full exercise of the power, *the existence of which the Court's own opinion denied,* permanent minimum rental rates were established for the future occupancy of the appellant City's market facilities. The minimum level of these rates was made to depend wholly upon the Court's determination, from time to time, of the propriety of the rate of return produced thereby upon the full value assigned by the Court to the Public Levee land and the market facilities, including the 45% of their cost donated by the Public Works Administration. The rental base established by the Court in this unprecedented exercise of a power expressly disclaimed by it was determined wholly upon the basis of the principles established in the *Minnesota Rate Cases, supra,* and of other decisions in which the right of litigants to resist an attempted compulsory use of private property for public purposes has been determined.

Thus, constitutional prohibitions against the taking of private property for public use were distorted into a prohibition against the use of public property by duly constituted public authority.

In this process, the Court below substituted for the minimum basis of rentals definitely prescribed for this publicly owned market by the statues of Kansas, in the lawful exercise of legislative power (Secs. 13-1242—13-

1243, G. S. Kan. 1935)[1], the judgment and discretion of a Federal Court in another state. For the minimum rate of return required by the Kansas statute, the Court below substituted his own indefinite determination and invited revision thereof from time to time at the instance of the private litigants, made parties to the decree and entitled to invoke its modification, as often as the protection of their "soliciting advantage in the west" may suggest.

That the doctrine which protects private property from confiscation may not be invoked to destroy public property for private advantage is obvious, but it is made definite and certain by the Court's findings, conclusions, and opinion that not even the Court's own erroneous conclusions as to the effect of the alleged participation of Union Pacific can lawfully produce that result.

> "One of the principal advantages resulting from such facilities as the food terminal is the *general benefit to the community,* and hence the return from such utilities must be considered, at least in part, in the light of their value to the community."[2]
>
> "*Under the circumstances of this case* the leasing of the facilities * * * at present rentals does not result in rebates and concessions in violation of the Interstate Commerce Act and the Elkins Act,"[3]
>
> "Such rate" of return "need not under the circumstances of this case exceed the rate of interest earned from an investment in government bonds or other securities."[4]

In its opinion, 34 Fed. Supp. 4, 7, the Court below said:

> "While the food terminal was conceived and fostered by the Union Pacific and the promoters in

[1] Appendix, p. 274.
[2] F. F. 43, R. 365.
[3] C. L. 16, R. 373.
[4] C. L. 18, R. 373-4.

> conjunction with the City, the general nature of the enterprise is such that it is properly classified as one from which general benefits will inure to the entire community. Public markets have existed almost from the beginning of mankind. The recorded history of civilization is replete with references to the early custom of the sovereignty furnishing at little or no cost, a place where the articles of common use may be offered for barter or exchange. The food terminal is a modern and glorified development of the ancient market places. * * * A city government with due regard for the well being of the community may in good faith conclude that the general good to be derived from such an enterprise justifies the exaction of less than the 'full, fair return' in money to which it and public utilities financed by private capital is entitled to demand. Hence, 'fair return' as that term is used in utility regulation, is not the criterion for determining the existence or absence of an unlawful intention to make a personal gift to tenants who are necessary to the success of the enterprise. The sum for which the City may lease its property and still avoid the charge of donating the use of that property may and should be governed to some extent, at least, *by the resulting general public benefit which the City Government is obligated to advance.*" (Emphasis ours.)

Precisely this "general benefit to the community" was given legislative recognition and effect by the Kansas statute in the direction that the governing body of the City should lease its market facilities "for such rental and upon such conditions as *in the judgment* of said governing body *will be to the best interest of such City.*"[1]

It could not be more plainly demonstrated than by the Court's own findings, conclusions, and opinions that even "under the circumstances of this case" the governing

[1]Sec. 13-1243, G. S. Kan. 1935; appendix, p. 274.

body of the appellant City, being obligated, in determining rates of rental, to consider the "general benefit to the community" may not be compelled to exact a return in money upon its Public Levee land and a Federal Grant of public funds, both freely donated to accomplish that identical "general benefit to the community."

That no requirement of the Interstate Commerce Act or Elkins Act was served by the valuation of the City's new market facilities and the attempted application thereto of the doctrine of confiscation cases is definitely demonstrated by the decision of this Court in *B. & O. v. U. S., supra.* The order of the Interstate Commerce Commission, reviewed in that case, was entered after years of investigation by the Commission of the competitive practices of New York carriers in supplying warehousing space and services to shippers.[1] The order entered by the Commission for the purpose of preventing further violations of the Interstate Commerce Act and Elkins Act directed the New York carriers to cease furnishing warehouse space "at rates and charges which fail to compensate * * * *for the cost of providing space.*" The case was submitted to this Court upon the definite assertion of the Commission through its counsel, l. c. 512:

> "As to return on investment, the order does not require that appellants make warehousing and storage rates and space rentals that will yield a profit. *It simply sets costs as the minimum.*" (Emphasis ours.)

The Commission's order was plainly susceptible of no other construction and was so accepted by this Court.

It was definitely asserted by counsel for the Commission in that case that "the order *prescribing costs as the*

[1] 198 I. C. C. 134
216 I. C. C. 291
220 I. C. C. 102

minimum, to correct violations of Sections 2, 3 and 6 of the Interstate Commerce Act, is fully supported by the New Haven case,"[1] and "for the future rightly corrects the discriminations and other violations of the Act by requiring the removal of the means by which they were accomplished."[2]

The order of the Commission in the New Haven case required only that the carrier cease selling coal purchased by it *at less than* the cost of the coal, plus the published tariff rate for its transportation. That order required no profit or return to the carrier upon its investment in the coal.

This contention of the Commission in support of its order in the Warehouse cases was sustained by this Court. In the opinion (305 U. S., l. c. 524), it is said:

> "As in *Merchants Warehouse Co.* v. *United States* the Commission 'rightly secured the discontinuance of the discrimination by ordering the carriers to cease employing the means by which it had been accomplished.'"

The orders in the *New Haven* case and *B. & O.* cases dealt with practices by carriers themselves and were directed to the carrier. Appellant City is not a carrier. By no process of reasoning and by no finding of the interest of or "association with a carrier" could the City be held to a higher standard of accountability in order to "enforce the observance of published tariffs" of a carrier than the carrier itself.

By the plain terms of the Kansas statute, the City was prohibited from leasing its warehouse space at less than

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[1] 200 U. S. 361
[2] 305 U. S. 511, 513

cost. It was obligated to impose rentals which would return not only its costs but would, in addition thereto, pay both the principal and interest of its bonds. By the undisputed evidence and by the findings of the Court below, it was definitely established that the rentals prescribed by the City exceeded these requirements and were adequate to yield a substantial profit to the City in addition. Upon the final hearing not a syllable of proof was offered to establish that any of the rates of rental prescribed by the City would or could result in "below cost" warehousing service. On the contrary, appellees' own proof established that by those rates of rental, the City had required tenants of its market to reimburse it for all of its costs, including depreciation, and to pay it a clear and substantial profit in excess thereof (*supra* p. 90).

By the Commission's own interpretation in the New Haven case and in its order in the New York Warehouse cases, observance of published tariffs by carriers requires no more than that the carriers impose charges for non-carrier facilities or service sufficient to reimburse them for their out-of-pocket cost, whether the facilities employed be new or old. The appellees sought and obtained in the Court below another and different application of the identical sections of the same Federal statute construed by the Commission in those cases. A Federal Statute designed to insure uniform and equal treatment demands uniform and equal application and enforcement if that objective is to be achieved.

The decree of the District Court in assuming regulatory control of the City's Market is violative of elementary principles of justice.

It has been shown that the rates of rental established by the City exceeded the minimum requirements of the Kansas statutes.[1-2] The resulting rate of return, even upon the Court's erroneous valuation basis, was found not to be so low as to involve a gift of any part of the value of the use of the facilities to shippers.[3] Thus, the Court below found that no violation of either the Kansas statute, the Interstate Commerce Act, or the Elkins Act had been established as to any rate of rental prescribed by the City; yet it enjoined the City from charging rentals which did not yield a "proper rate of return" upon the Court's valuation. Upon specific findings that no violation of law was proven or threatened as to future rentals, it assumed, none the less, control thereover.

The decree of the District Court definitely prohibits the City from exercising the powers conferred upon it by the Kansas statute, and, therefore, under the principles laid down by this Court in *Lauf et al.* v. *E. G. Shinner & Co.*, 303 U. S. 323, 328, it is void. This Court said:

> "The error into which the court fell as to the existence of a labor dispute led it into the further error of issuing an order so sweeping as to enjoin acts made lawful by the State statute."

Under the decree of the Court below, its judgment instead of the Kansas statute is made the sole basis of authority under which the City may act in relation to future rates of rental. Therefore, the Court below, in

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[1]Sec. 13-1243, G. S. Kan. 1935; appendix, p. 274.
[2]F. F. 34, R. 359-60.
[3]F. F. 42, R. 365.

entire disregard of the legislative determination of minimum rental rates, plainly expressed in the Kansas statute, set up a legislative formula of its own. This no court may do.

Prentis v. *Atlantic Coast Line*, 211 U. S. 210, 226.
Louisville and Nashville R. R. Co. v. *Garrett*, 231 U. S. 298.
Keller v. *Potomac Electric Power Company*, 261 U. S. 428.

The Court's prohibition extends to the future. Plainly this exercise of control by the Court over the future rates of rental for the City's market was neither compelled nor warranted by all or any of the Court's conclusions in relation to joint responsibility and liability of the Union Pacific for the payments which the City proposed to make to its tenants. If, upon any theory, it was established that those proposed payments constituted rebates or concessions prohibited by the Interstate Commerce Act or the Elkins Act, the only relief warranted was an order enjoining such payments. Nothing, either in law or in the record, warrants the guardianship imposed upon the City by the Court's final decree.

In prohibiting the City from renting its market in the future at rentals which do not yield a "proper rate of return," the Court below improperly assumed generally to prohibit future violations of the law for which there is no present factual basis, and its decree in so doing is violative of elementary principles of justice. This principle was applied in *New York, New Haven and Hartford Railroad Company* v. *Interstate Commerce Comm.*, 200 U. S. 361, 404, where this Court rejected a contention of the Interstate Commerce Commission in support of a decree which it had obtained in the Court below enjoining future violations of the Elkins Act. This Court said:

"The contention, therefore, is that whenever a carrier has been adjudged to have violated the act to regulate commerce in any particular it is the duty of the court, not only to enjoin the carrier from further like violations of the act, but to command it in general terms not to violate the act in the future in any particular. In other words, the proposition is that by the effect of a judgment against a carrier concerning a specific violation of the act, the carrier *ceases to be under the protection of the law of the land and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction.* * * * The requirement of the act to regulate commerce that a court shall enforce an observance of the statute against a carrier who has been adjudged to have violated its provisions, in no way gives countenance to the assumption that Congress intended that a court should issue an injunction of such a general character as would be violative of the most elementary principles of justice." (Emphasis ours.)

The decree of the Court below could only enjoin such violations of the Acts as were complained of and proven. It could prescribe no course of conduct to prevent future violations generally, even if its own findings had not denied the existence of a present violation as to rental rates. This principle was recently applied by this Court in *Hague* v. *C. I. O.*, 307 U. S. 496, in which the Court below had held void a City ordinance placing restraints upon the distribution of circulars, handbills and placards and enjoining the defendants from communicating their views to others in a peaceable manner on the city streets, and in prescribing conditions under which the defendants might distribute pamphlets and speak in the future. This Court disapproved that portion of the decree wherein rules for future conduct were prescribed.

The Court below gave expression to its lack of authority to fix rates of rental in its Supplemental Memorandum on Final Hearing of July 13, 1940,[1] when it said:

> "It is for rate-making bodies acting as the arm of the legislative branch of the government to fix rates *in futuro.*"

Despite this admitted lack of authority, the Court below enjoined the City from exacting rentals which did not yield a proper rate of return and thereby effectually exercised a power to fix rates which it said it did not have.

In the same opinion the Court below states (R. 377):

> "In this case the court is called upon to determine *what present conditions are and whether those conditions constitute a violation of the law.* As noted in the memorandum opinion heretofore filed, we are dealing now with the question of whether the facts show at present a violation of the law and not in suppositions as to what future violations may possibly occur. And while the order made in this case will enjoin future acts, such inhibition will be made in the light of the present facts and not be based upon the presumption of facts conceivable but not now existing."

What the "facts show at present," with reference to the rates of rental established by the City, as found by the Court, was that:

> "the present rental rates and the consequent return to the City are not so low that the use of the Food Terminal by tenants in interstate commerce at those rentals will amount to a gift of any part of the value of the use of the Food Terminal to the tenant shippers."

[1] R. 377.

And in its conclusion of law No. 16 (R. 373) the Court below held:

> "Under the circumstances of this case, the leasing of the facilities of the Kansas City Food Terminal, at present rentals, does not result in rebates and concessions in violation of the Interstate Commerce Act and the Elkins Act."

Thus, the Court itself demonstrated the complete absence of any present factual basis upon which to rest its invasion of the statutory authority of the City as to future rentals. Nothing was left whereon the Court's order as to the future could rest but the "suppositions" which the Court itself asserted to be an inadequate basis.[1] In the *New Haven* and *Hague* cases, *supra*, this Court condemned such a basis for the exercise of judicial power.

The Court's own findings and conclusions that no present violation of any law has been shown with respect to the City's rates of rental for its market facilities plainly demonstrated that its prohibition as to future rental rates was the exercise of legislative power only. That conclusion was not avoided by the expedient of refraining from presently prescribing and leaving for future consideration, in the light of subsequent events, the specific rate of return which the City is to be compelled to exact. In lieu of such a specific rate, the Court prescribed the wholly indefinite "proper rate of return." The Court thereby subjected the rates of rental derived by the City to its own future regulation and determination. Under the decree, the City can summarily be brought into Court by the appellee railroads and the appellee City in every instance where the City might lease any of the market facilities at any rate of rental. The Court and

[1] F. F. 42, R. 365.

not the City through such means may exercise plenary control and supervision over every transaction entered into by the City with a prospective lessee. Not only is it apparent that the Court lacks jurisdiction to enter such a decree, but it is also obvious that such a decree transcends all fundamental principles of justice in subjecting the City to surveillance by competitors to whom contempt process has been made available by which they and not the appellant City may control every detail of the operation of the City's public market.

The argument may be concluded by the apt statements made by this Court in *Palmer* v. *Massachusetts*, 308 U. S. 79, 83, and in *Pennsylvania* v. *Williams*, 294 U. S. 176, 185. In the former case this Court said:

> "Plainly enough the District Court had no power to deal with a matter in the keeping of state authorities unless Congress gave it. And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government."

In *Pennsylvania* v. *Williams*, this Court said:

> "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state

governments in carrying out their domestic policy (citing cases). * * * There are stronger reasons for adopting a like practice where the exercise of jurisdiction involves an unnecessary interference by injunction with the lawful action of state officers."

VII.

CONCLUSION.

It is respectfully submitted that the decree of the District Court must be reversed for the following reasons:

1. Under the law of Kansas as construed by its highest court, controlling upon the Court below but disregarded by it, the City possessed plenary power to make payment of the proposed adjustments out of its Public Levee revenues.

2. Under the law of Kansas as applied by its Supreme Court, which was controlling upon the Court below but disregarded by it, no joint venture or joint liability existed between the City and Union Pacific respecting the City's public market, because no contract embodying elements essential to the creation of such relationship was entered into between the parties.

3. The City in the conduct of its market cannot be lawfully subjected to the regulatory control of the Court below on the ground that the City's funds intended to be used for the payment of adjustments to produce dealers were subjected to a first lien for the payment of the revenue bonds, when the statutes of the state and the ordinances of the City under which the bonds were issued, as construed by the State Supreme Court, controlling upon the Court below but disregarded by it, expressly negative the existence of such a lien and affirmatively establish the right of the City to make such payments free from any lien, claim or objection of the bondholder, and

having no legal right to complain there manifestly was no waiver by Union Pacific of its lien as a bondholder.

4. The City not being a carrier subject to either Act and no funds of Union Pacific being offered or paid, the proposed payments from the City's revenue funds would not bring about the result forbidden by either Act whereby a common carrier would be caused to transport freight at less than its published tariffs.

5. No conspiracy or plan, scheme, device or subterfuge to violate either Act was established, because the objectives of the City in making the proposed adjustments with its public revenues being lawfully authorized under the Kansas statutes, as construed by the highest court of the state, and no funds of Union Pacific or any other carrier being used for such purpose, any agreement, plan or understanding to attain such a lawful objective is not unlawful.

6. The Court below ignored elementary principles of justice in assuming power to regulate and control future rentals to be exacted by the City by requiring that it shall derive "a proper rate of return," when the Court below held it possessed no authority to prescribe future rentals and found present rates of rental are not so low as to amount to a gift to any shipper.

7. The Elkins Act may not be used by competing railroads or a competing city as a means to restrain competition and thus bring about a result condemned by the policy of Congress and this Court in the Interstate Com-

merce Act and anti-trust laws and cases arising thereunder. The reasons stated compel a reversal of the decree of the Court below.

Respectfully submitted,

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Counsel for Appellants City of Kansas City, Kansas; Don C. McCombs, Francis Blake and George T. Darby, as Commissioners and constituting the Governing Body of said City; Alton H. Skinner, Howard Payne and Truman Schlup, duly appointed officials of said City.

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APPENDIX.

A. Federal Statutes.

1. Section 2, Chapter 544, Act of February 11, 1903 (32 Stat. p. 823), as amended by Section 291, Chapter 231, Act of March 3, 1911 (36 Stat. p. 1167), Title 49 U. S. C. A. Section 45:

> "*Appeals to Supreme Court.* In every suit in equity brought in any district court of the United States under any of the laws mentioned in the preceding section, wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof."

2. Title 49, U. S. C. A., Section 44, commonly known as the "Expediting Act," as amended by Section 291, Chapter 231, Act of March 3, 1911, 36 Stat. p. 1167, which latter Act abolished circuit courts and made laws theretofore relating to circuit courts applicable to district courts. In this section the suit "under any of the laws mentioned in the preceding section wherein the United States is complainant" is defined as "in any suit in equity brought in any district court of the United States under the preceding chapter or any other statutory provisions having a like purpose that may be enacted wherein the United States is complainant * * *."

3. Section 238 of the Judicial Code, as amended, 43 Stat., p. 938, Chapter 229, Section 238, par. 1, Act of February 13, 1925; Title 28, U. S. C. A., Section 345:

> "*Appellate jurisdiction from decrees of United States district courts.* A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections or parts of sections and not otherwise:

(1) Section 29 of Title 15, and section 45 of Title 49. * * * "

4. Chapter 708, Section 1, 32 Stat. 847, Act of February 19, 1903 (Title 49, U. S. Code Annotated, Sec. 41, subpar. (1), commonly known as Section 1, Subpar. (1) of the Elkins Act, the pertinent portion of which is as follows:

"Anything done or omitted to be done by a corporation common carrier, subject to the preceding chapter, which) if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under sections 41, 42, or 43, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said chapter or by sections 41, 42, or 43, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced.

Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: *Provided,* That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43, or of the preceding chapter, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. * * * "

5. Chapter 708, Sec. 3; 32 Stat., p. 848, Act of Feb. 19, 1903, as amended by Sec. 291, Chapter 231, Act of March 3, 1911, which latter Act abolished Circuit Courts and made laws relating thereto applicable to District Courts (Title 49, U. S. Code Annotated, Sec. 43), commonly known as Section 3 of the Elkins Act, the pertinent portion of which is:

"Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the district court of the United States sitting in equity having jurisdiction; * * * whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties

thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, * * * *Provided,* That the provisions of Sections 44 and 45 shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission."

6. The following Sections of the Interstate Commerce Act of February 14, 1887, as amended by the Act of February 28, 1920:

(1) Chapter 91, Sec. 404; 41 Stat., p. 479 (Title 49, U. S. Code Annotated, Section 2):

"If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances

and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

(2) Chapter 104, Sec. 3, 24 Stat., p. 380 (Title 49, U. S. Code Annotated, Subparagraph [1], Section 3):

"It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

(3) Chapter 3591, Act of June 29, 1906, 34 Stat., p. 587, amended by Chapter 91, Sec. 411; 41 Stat. 483 (49 U. S. Code Annotated, Subparagraph [7], Section 6):

"No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

(4) Chapter 128, Sec. 12, Act of Feb. 10, 1891, 26 Stat., p. 743, as amended by Chapter 91, Sec. 415, 41 Stat. 484 (Title 49, U. S. Code Annotated, Subparagraph [1], Section 12):

"The commission created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this chapter, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created; and the commission is authorized and required to execute and enforce the provisions of this chapter; and, upon the request of the commission, it shall be the duty of any district attorney of the United States to whom the commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expense of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this chapter the commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation."

B. Statutes of the State of Kansas.

1. Section 13-1238 G. S. Kan. 1935 as amended, 1937:

"The governing body of any city in this state having a population of 115,000 or over, is hereby empowered and authorized, without any election or vote of the people, to issue and sell in the same manner as

provided by law for the sale of general obligation bonds, revenue bonds of such city as hereinafter defined and described, to secure funds to provide the cost of improving, constructing, reconstructing or repairing public levees, docks, wharves, river terminals, grain elevator terminal docks, and such works, storage, structures, facilities and properties as in the judgment of said governing body will be necessary or convenient for the accommodation of shipping by highways, pipe lines, rail or water, in connection with commerce or water transportation on the navigable river or rivers adjoining such public levees: *Provided*, That the governing body of any such city which shall have issued and sold revenue bonds under the provisions of this act, is hereby empowered and authorized to issue additional revenue bonds in conformity with this act for the purpose aforesaid and to pledge for the payment of such additional revenue bonds the revenues of the public levee and the facilities connected therewith, together with the revenues from any improvements and extensions to the public levee: *Provided, however*, That no additional revenue bonds shall be issued and sold if there is an issue of revenue bonds outstanding for the payment of which the revenues of the public levee and the facilities connected therewith have been pledged unless the governing body of such city, the holder or holders of all such outstanding revenue bonds consenting, shall take up and pay for or make an exchange for such outstanding issue of revenue bonds at a price of not to exceed the par value thereof, plus interest accrued on such bonds at the coupon rate from the interest payment date preceding the date of payment of the purchase price to the date of payment of the purchase price, plus a premium, if any, of not to exceed one per cent of the par value of such outstanding revenue bonds or make an exchange for such issue of outstanding revenue bonds. Additional revenue bonds issued and sold under the authority of this act shall

be in an amount necessary to take up and pay for the issue of outstanding revenue bonds or make an exchange for such issue of outstanding revenue bonds as aforesaid, plus an amount necessary to finance or aid in financing the cost of additional improvements, construction, reconstruction or repairs of the public levees, docks, wharves, river terminals, grain elevator terminal docks, and such works, storage, structures, facilities and properties as in the judgment of said governing body will be necessary or convenient for the accommodation of shipping by highways, pipe lines, rail or water, in connection with commerce or water transportation on the navigable river or rivers adjoining such public levee."

2. Section 13-1239, G. S. Kan. 1935:

"Revenue bonds, as the term is used in this act, are defined to be bonds issued by any such city in this state to be paid exclusively from the revenue produced by the property and facilities improved, constructed, reconstructed, repaired or otherwise improved by the use of the proceeds of said bonds. Such revenue bonds shall not be general obligations of the city, and shall not contain the recitals set forth in Section 10-112, Revised Statutes of Kansas for 1923, or any amendments thereof. Such revenue bonds shall, however, contain the following recitals, viz.: such bonds shall recite the authority under which said revenue bonds are issued, and that they are issued in conformity with the provisions, restrictions and limitations thereof, and that such bonds and the interest thereon are to be paid from the money and revenue received from the fees charged and rental received for the use of the property and facilities improved, constructed, reconstructed, repaired or otherwise improved by the proceeds, in whole or in part, of such revenue bonds when issued and sold.

"Said revenue bonds shall recite, also, that the same have been registered in the office of the city

clerk of said city, and in the office of the auditor of the state of Kansas, and when said bonds have been duly registered as herein provided, shall import absolute verity, and shall be conclusive as to said recitals, in favor of all persons purchasing said bonds, and that all proceedings and conditions precedent have been had and performed to authorize the issuance of said bonds, and said bonds shall be negotiable."

3. Section 13-1240 G. S. Kan. 1935:

"Said revenue bonds shall not constitute in any case, a general obligation of such city, and said bonds, if and when issued, shall in no wise be taken into consideration or account as a limitation on the power of such city to issue bonds for any and all other purposes heretofore or hereafter authorized by law, with relation to a limitation upon the bonded indebtedness of said city.

"The governing body of any such city may contract for the sale of said bonds to the government of the United States, under the provisions of the national industrial recovery act and the regulations made in pursuance thereof, to procure funds for the improvement, construction, reconstruction or repair of the public levees, docks, wharves, river terminal, grain elevator terminal docks, storage, railroad and all other necessary facilities, on such terms and conditions as in the judgment of said governing body will be to the best interest of such city and may create a lien on the revenues to be obtained from such property and facilities and pledge the same to the payment of said revenue bonds and interest thereon."

4. Section 13-1241 G. S. Kan. 1935:

"Such revenue bonds issued under the terms of this act shall mature serially or otherwise to con-

form to plan of liquidation and payment of said bonds and interest thereon: *Provided, however,* that the date of maturity of any of said bonds shall not be fixed for a longer period of time than thirty years after the date of issuance, and said bonds shall bear interest at a rate not to exceed five percent (5%) per annum, and the amount of interest due each year shall be evidenced by coupons attached to each bond issued. Such city shall have no right or authority to levy taxes to pay the principal or interest of revenue bonds as defined herein and the provisions of section 10-113 of Revised Statutes of Kansas for 1923 shall not apply to this act."

5. Section 13-1242 G. S. Kan. 1935:

"Provision shall be made by the governing body of such city for the payment of said bonds, by fixing rates and charges for the use of and the services to be rendered by such property and facilities, which rates and charges so fixed shall be sufficient to pay all expenses of the city in connection therewith and cover the cost of operation and repairs, pay all interest charges upon all indebtedness created for the purpose of improving, constructing, reconstructing, repairing or improving of such public levee and the improvements and facilities thereon for which such revenue bonds were issued to so improve, construct, reconstruct or repair and to provide a sinking fund sufficient to pay off such indebtedness at maturity."

6. Section 13-1243 G. S. Kan. 1935:

"The governing body of such city, is hereby empowered and authorized to enter into an agreement in writing with any person, firm or corporation to erect and construct on its public levee, improvements and facilities authorized and mentioned in this act and lease the same for a term of not to exceed ninety-nine years for such rental and upon such

conditions as in the judgment of said governing body will be to the best interest of such city, provided the rent fixed by any such agreement and lease shall be sufficient to liquidate and pay all expenses of the city connected therewith and the principal and interest of all revenue bonds issued or to be issued to pay the full cost of such improvements and facilities so leased."

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